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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

NOVA UNIVERSITY,

Petitioner,

v.

EDUCATIONAL INSTITUTION LICENSURE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED

Nova University is a fully accredited university with its home campus in Ft. Lauderdale, Florida. In addition to its residence programs, it has developed a small, experimental external degree program leading to the conferral of a Doctorate of Public Administration (DPA). The Chairman of Harvard University's Department of Government testified that this external degree program is comparable in quality to the residence program offered at Harvard University. The District of Columbia Educational Institution Licensure Commission ("EILC" or "Commission") nevertheless denied Nova a license to teach this program to a small group of 20 to 25 students in the District of Columbia because Nova does not own a library in the District of Columbia and none of its faculty teaches full time in the District of Columbia. The District of Columbia Court of Appeals found substantial evidence to support the Commission's denial of a license. The court upheld the agency, *not* because Nova's educational program was actually "substandard" (D.C. Code § 31-1601(1) (1981)), but because there was "an unacceptable risk that the program will be 'substandard' " (App. 37; 483 A.2d at 1191).[1]

The questions presented are:

1. Assuming a state may deny an accredited university the right to offer a degree program that is "substandard," does the First Amendment require a court to review *de novo* whether such a program is "substandard"?

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[1]The notation "App." refers to the bound Appendix attached hereto. Where the following notations are found herein, their meaning is as described: the notation "Finding" refers to a Finding of Fact as determined by the EILC; Roman numerals refer to the volume of the transcript of the hearing before the EILC with Arabic numerals referring to the page numbers therein; the notation "R." refers to the Record prepared by the EILC.

2. May a court, consistent with the First Amendment, affirm the denial of a license to offer such a degree program on the basis of "an unacceptable risk that the program will be 'substandard' " (App. 37; 483 A.2d at 1191) or may it do so only on the basis of a finding that the program *is* "substandard"?

3. Does the denial of a license to Nova to teach a doctoral program to 20 part-time students on the ground that the university does not own its own library in the District of Columbia and has no full-time teachers in this program resident in the District of Columbia constitute an unconstitutional application of the statute and regulations, in violation of the First Amendment, given the undisputed high quality of the program?

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioner Nova University respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the District of Columbia Court of Appeals entered on November 9, 1984.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported at 483 A.2d 1172 (D.C. 1984). It is reprinted in the appendix (App. 1-37). The Findings of

Fact, Conclusions of Law, Decision and Order of the Educational Institution Licensure Commission is reprinted in the appendix (App. 38-45).

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on November 9, 1984, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3). *See Palmore* v. *United States,* 411 U.S. 389, 395 (1973).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, the relevant District of Columbia statutory provisions and the pertinent regulations of the EILC are set forth in the appendix, pp. 46-57.

STATEMENT OF THE CASE

Nova is a fully accredited,[2] non-profit university with its 200-acre home campus in Ft. Lauderdale, Florida.

In addition to its residence programs, Nova offers several experimental field-based programs known as external degree programs (App. 6; 483 A.2d at 1177). The external degree program involved in this case consists of an intensive course of study leading to the award of a Doctorate in

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[2]Nova's degrees, including the DPA involved here, are awarded in Florida pursuant to authority granted by the State of Florida (Finding No. 10, App. 39). In addition, Nova is fully accredited as an institution of higher learning by the officially recognized regional accrediting association, the Southern Association of Colleges and Schools (SACS) (Finding No. 28, App. 42). Nova is also recognized by the Veterans Administration and the United States Office of Education.

Public Administration ("DPA"). It is designed for mid-career professionals who wish to improve their competency as public managers, but who cannot take off a year from their jobs to enroll in a full-time residence program (I:53).

Much of the teaching in this program is conducted in clusters of 20-25 students at a location near the students' homes, although a considerable portion of the work is also done in residence at Nova's home campus in Florida (App. 6-7; 483 A.2d at 1178). Other than the field-based nature of the program, the work required is similar to that of residence programs.

Nova offers this carefully structured program in 11 states. Desiring to offer the program to approximately 20 students in the District of Columbia, Nova applied to the Educational Institution Licensure Commission for a license, following the Commission's advice that a license was required to offer these courses, even though any degree that might ensue would be awarded in Florida, pursuant to authority granted by that state (App. 6; 483 A.2d at 1177).

At the administrative hearing before the Commission on Nova's application, Professor John D. Montgomery, Chairman of the Department of Government at Harvard University and Professor of Public Administration at Harvard's Kennedy School of Government, testified in detail concerning all aspects of Nova's DPA program (III:5-45) and concluded "that probably no other university has mobilized the resources, the amount of resources, that Nova has for the development and teaching of the Doctorate in Public Administration" (III:8). Professor Montgomery stated that in his judgment Nova's DPA program has an "adequate selection of courses" (III:10-11, 13); that

the reading materials "were well-chosen" (III:10); that there was enough material required "to cover our present knowledge of the particular area" (III:10); and that the students' research reports submitted in other states where the program was being offered are "at an adequate level of scholarship" (III:10-11).

Professor Montgomery also compared Nova's program with the Harvard program. He found that the number of class hours required was equivalent in both programs (III:13), and that the student papers "were approximately at the same level of effort as our seminar paper [at Harvard]. And I also got the feeling that the grades that were assigned were within the same range" (III:14). Similarly, Professor Montgomery testified that the Nova students' research project that was the equivalent of a dissertation "would have been acceptable" as a dissertation at Harvard (III:38-39).

Many other distinguished academicians were prepared to testify favorably concerning the quality of Nova's program, but the Commission decided it could not take time to hear these people (II:232, 236-38).[3]

Nova's DPA faculty is acknowledged on all sides to be stellar. The Commission itself found that Nova's DPA faculty consists "of distinguished scholars prominent in

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[3]Among the witnesses who were available to testify but were not heard for lack of time (II:232, 236-38) were the director of the Advanced Study Program, The Brookings Institution, a former Dean of the College of Public and International Affairs at The American University; a professor in the Department of Public Administration, Maxwell School, Syracuse University; the President of the National Institute of Public Management, Professor of Public Administration (and former Department Chairman) at Howard University's School of Business and Public Administration; and several other distinguished scholars.

the public administration field" (Finding No. 10, App. 39).

The Commission denied Nova a license, however, on two grounds:

> 1. Nova did not intend to own its own library in the District of Columbia. (App. 44) (Nova had made formal arrangements with Howard University and George Mason University for Nova students to use their libraries) (App. 43).
>
> 2. Although Nova had nine full-time teachers in the program as a whole (Finding No. 16, App. 40), Nova did not intend to have any full-time teachers resident in the District of Columbia and devoted to this DPA cluster because it would have only 20-25 part-time students in the District (App. 39).

The relevant District of Columbia statute requires an applicant for a license to be "possessed" of "suitable" library equipment and to have a "properly qualified" faculty.[4]

In generalized language, the Commission's regulations expand on these requirements. The pertinent portions of the regulations are set forth in the margin.[5]

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[4]Section 29-815(4) of the District of Columbia Code provides in pertinent part as follows:

> That considering the number and character of courses offered, the faculty is of reasonable number and properly qualified, and that the institution is possessed of suitable . . . library equipment.
>
> D.C. Code § 29-815(4)(1981).

[5]Section III(4)(b) of the EILC Regulations provides as follows:

> There shall be a sufficient number of full-time teaching appointments to insure continuity and stability of the educational program, as well as to provide adequate educational association between students and faculty.

Section III(A)(8) provides as follows:

The Commission found that Nova's provisions for library and faculty were inadequate, and denied Nova's applications (App. 44).

The District of Columbia Court of Appeals, which by statute[6] reviews Commission decisions, affirmed.

In reviewing the Commission's decision denying Nova a license on the ground that it did not have adequate full-time faculty and adequate library resources, the court relied on the substantial-evidence test rather than giving *de novo* consideration to whether the absence of a library and lack of full-time faculty in the District of Columbia justified the denial of a license (App 35; 483 A.2d at 1191).

The Court of Appeals noted that:

> [T]he Commission has the discretion to waive [the library requirement] as well as other requirements when it believes the requirement is inapplicable or unnecessary in particular cases

(App. 36; 483 A.2d at 1191).

The Commission chose not to do so and the Court found that:

> [W]e cannot say that the Commission's failure to do so [waive the requirements] in this case was irrational or not based on substantial evidence.

Id.

> The collection of books, periodicals, newspapers, . . . shall be adequate for the needs of the educational programs of the institution, and shall be readily accessible to the faculty and the students.
>
> Provisions shall be made for the continuous acquisition of current library materials and for the recording of all library holdings.

[6]D.C. Code § 29-817 (1981).

Moreover, the Commission's factual conclusion, which the court affirmed on the basis of a substantial-evidence review, was *not* that Nova's program was actually "substandard,"

> but rather that certain deficiences present an unacceptable risk that the program will be "substandard". . .

(App. 37; 483 A.2d at 1191).

In short, the Court of Appeals decided that there was *substantial evidence* in the administrative record to conclude that there was a *risk* that Nova's program would be "substandard."

REASONS FOR GRANTING THE WRIT

1. THE FIRST AMENDMENT REQUIRES THE COURT OF APPEALS TO REVIEW *DE NOVO* WHETHER THE ALLEGED DEFICIENCIES IN NOVA'S PROGRAM JUSTIFIED THE DENIAL OF A LICENSE.

By limiting itself to a "substantial evidence" review,[7] the Court of Appeals deferred to the Commission's judgment that the alleged deficiencies in Nova's educational program justified the denial of a license. Thus, no court has ever made an independent judicial determination that, within the strictures of the First Amendment, a license to operate may be denied on these grounds. Since the agency never considered whether its denial of a license violated the First Amendment, *no* tribunal has ever made a *de novo* judgment as to whether the denial of a license on the undisputed evidence in this case violated the First Amendment.

[7]The Court of Appeals stated, "[T]he Commission's denial was based on substantial evidence" (App. 35; 483 A.2d at 1191) and "This court does not undertake a *de novo* review of the record in an administrative proceeding" (App. 34; 483 A.2d at 1190).

As the court below recognized:

> The facts upon which the Commission rested its conclusion that Nova did not meet the District's library and faculty standards are essentially undisputed

(App. 32; 483 A.2d at 1189).

Thus, we are not asking for a court to resolve an evidentiary dispute.[8] We are simply asking for at least one court to decide *de novo* the mixed question of fact and constitutional law as to whether the First Amendment has been violated by the denial of a license to Nova on the ground that its educational program is "substandard" (D.C. Code § 31-1601(1) (1981)).

The Court of Appeals not only failed to apply the appropriate standard of review, it also failed to decide the basic constitutional question – whether the District of Columbia statute and regulations have been unconstitutionally applied in this case.[9]

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[8]In some cases where constitutional deprivations are claimed, courts will even review evidentiary disputes *de novo*. *E.g., Schware v. Board of Bar Examiners of the State of New Mexico,* 353 U.S. 232 (1957).

[9]The court below purports (at the end of Part IV of its opinion), at least implicitly, to consider whether the statute and regulations were unconsitutionally applied in this case (App. 28; 483 A.2d at 1187). But it asked only purely legal questions; Was the Commission's inquiry "limited to neutral, sound, academic criteria?" Did the Commission impermissibly deny Nova a license because of the particular subjects it teaches, the content of its books or the views of its teachers? Is requiring a library and teachers incompatible with the academic endeavor or intellectual freedom within the university?

These are different questions than the one we pose. We asked the court to consider the mixed question of fact and constitutional law: Does the denial of a license to this program based on the absence of a

In a closely analogous case, this Court has recently required *de novo* appellate review of a finding of "actual malice" in a libel case. *Bose Corp.* v. *Consumers Union of the United States, Inc.*, ____ U.S. ____, 104 S.Ct. 1949 (1984).

This Court stated:

> We hold that the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times* v. *Sullivan*. Appellate judges in such a case must exercise independent judgment. . .

Bose, __ U.S. at __, 104 S.Ct. at 1967 (footnote omitted).

The *Bose* case is analogous, rather than directly in point, because there the question was whether the "clearly erroneous" standard should be applied on an appeal from a federal court, rather than whether the substantial-evidence standard should be applied on an appeal from an agency decision. This distinction, however, only highlights the fact that, in this case, Nova has never had an independent judicial determination of its constitutional claim that the facts of this case do not, under the First Amendment, justify the denial of a license. In *Bose*, at least a federal

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local library and local full-time faculty violate the First Amendment?

The court below never addressed this question. In the final part of its opinion, *i.e.*, Part VI (App. 31-37; 483 A.2d at 1187-89), it considered the question as to:

> [W]hether the Commission's decision to deny Nova a license was error under D.C. law

(App. 31; 483 A.2d at 1189).

Here it considered the facts and found that there was substantial evidence to support the Commission's decision, but the court never considered the facts in terms of the strictures of the First Amendment.

district court, in an independent *de novo* determination, ruled as to the presence of actual malice. In this case, however, no court has ever exercised an independent judgment as to whether, consistent with the First Amendment, the alleged deficiencies in Nova's program justify the denial of a license.

Whether the principle of *Bose,* requiring a *de novo* review, is applicable to an administrative finding such as is involved here, requires a brief canvass of the development of the law surrounding *Crowell* v. *Benson,* 285 U.S. 22 (1932). In *Crowell,* the Court required *de novo* review of an agency finding fixing a workmen's compensation award. The Court held that a reviewing court must make a *de novo* determination of "jurisdictional facts" (in that case, whether the injury occurred on navigable waters of the United States and whether a master/servant relation existed) and of "constitutional facts."

Subsequently, however, the application of *Crowell* was circumscribed. As Justice Brennan recently observed:

> *Crowell*'s precise holding, with respect to the review of "jurisdictional" and "constitutional" facts that arise within ordinary administrative proceedings, has been undermined by later cases.

Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.,* 458 U.S. 50, 82 n. 34 (1982).

But those cases subsequent to *Crowell* denying *de novo* review to agency determinations of fact involving constitutional claims have all concerned economic and business claims (*e.g.,* claims of unconstitutional confiscation of property based on utility and transportation rates[10])

[10] *St. Joseph Stock Yards Co.* v. *United States, 298 U.S. 38 (1936); FPC* v. *National Gas Pipeline Co.,* 315 U.S. 575 (1942); *FPC* v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944); *Alabama Public Service Comm'n.* v. *Southern Ry. Co.,* 341 U.S. 341, 348 (1951); *American Trucking Ass'ns., Inc.* v. *United States,* 344 U.S. 298 (1953).

not personal rights. Where personal rights have been involved, courts have given *de novo* review to constitutional facts on appeal from administrative agencies. Thus, for example, the rule of *Crowell* requiring *de novo* consideration of constitutional facts was recently applied to a deportation proceeding that sought review of an administrative determination that the petitioner was not a United States citizen. *Agosto* v. *Immigration and Naturalization Service,* 436 U.S. 748 (1978). In *Agosto*, this Court relied on *Ng Fung Ho* v. *White,* 259 U.S. 276 (1922), a case which the Court also relied on in *Crowell.* In *Agosto,* the Court commented that *Ng Fung Ho* held:

> [T]hat the Constitution requires that there be some provision for *de novo* judicial determination of claims to American citizenship in deportation proceedings.

Agosto, 436 U.S. at 753.

Neither *Crowell* nor *Ng Fung Ho* has been overuled; and this Court has cited both with approval in recent years. *See Agosto,* 436 U.S. at 753; *Atlas Roofing Co., Inc.* v. *Occupational Safety and Health Review Commission,* 430 U.S. 442, 450 n.7 (1977).

As Justice Brennan stated in *Northern Pipeline:*

> [T]he general principle of Crowell — distinguishing between congressionally created rights and constitutionally recognized rights — remains valid.

Northern Pipeline, 458 U.S. at 82 n. 34.

Also relevant is *United States* v. *Raddatz,* 447 U.S. 667 (1980), where this Court, citing *Ng Fung Ho,* held that magistrates in criminal cases could initially decide suppression motions based on constitutional claims because the magistrate's ruling was reviewable *de novo* by the district

court. If the statutory scheme permitting magistrates to hear suppression motions had not provided for *de novo* judicial review, it would have been unconstitutional.

Thus, at this stage of development of the law, it appears that while *de novo* review is not required in cases of agency determinations of constitutional facts involving property rights, *de novo* review *is* required in cases involving personal liberties. Given this Court's ruling in *Bose* requiring *de novo* appellate review of factual findings in a libel case, it seems clear that *de novo* review is also required of an agency decision challenged on the ground that it violates the First Amendment.

This Court recently required *de novo* review of an administrative disciplinary proceeding brought against a lawyer for solicitation. *Ohralik* v. *Ohio State Bar Association,* 436 U.S. 447, 463-64 & n. 21 (1978). This Court stated:

> [W]e must undertake an independent review of the record to determine whether that conduct was constitutionally protected.[21]

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[21]Time, Inc. v. Pape, 401 U.S. 279, 284 (1971) Jacobellis v. Ohio, 378 U.S. 184, 189 (1964); New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964); Napue v. Illinois, 360 U.S. 264, 271-72 (1959).

Without canvassing all of the cases cited in the Court's footnote, we simply note the statement in *Jacobellis:*

> Nor do we think our duty of constitutional adjudication in this area can properly be relaxed by reliance on a "sufficient evidence" standard of review. Even in judicial review of administrative agency determinations, questions of "constitutional fact" have been held to require *de novo* review.

Jacobellis, 378 U.S. at 190 n. 6 (*citing, Ng Fung Ho,* 259 U.S. at 284-85; *Crowell,* 285 U.S. at 54-65).

This Court has elsewhere noted that "independent examination" may be necessary "to assure ourselves that the judgment . . . does not constitute a forbidden intrusion on the field of free expression' " *New York* v. *Ferber,* 458 U.S. 747, 774 n.28 (1982) (*quoting from, New York Times* v. *Sullivan,* 376 U.S. 254, 285 (1964)); *Time, Inc.* v. *Pape,* 401 U.S. 279, 284 (1971).

The court below should have made an independent determination, by way of *de novo* review, as to whether the alleged deficiencies in Nova's educational program justified the denial of a license in light of the strictures imposed by the First Amendment.

It is especially important for a court to exercise its independent judgment, via *de novo* review, of such a question because of the possibility that, at the administrative level, surrreptitious consideration may have affected the determination. As this Court has stated:

> Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient.

St. Joseph Stock Yards Co. v. *United States,* 298 U.S. 38, 52. (1936).

Applicants for licenses to offer new educational programs are often non-establishment outsiders. With respect to external degree programs, they may well be, as here, from out-of-state and thus be seen as interlopers. It is not often that potentially surreptitious considerations can be shown to have existed and we do not claim to be able to show them here. We can, however, illustrate the kind of thing that can happen because it happened to Nova in

North Carolina. There, as in the District of Columbia, Nova was denied a license to offer its degree courses. The North Carolina Supreme Court ultimately reversed that determination on statutory grounds; the court implied that the agency decision may well have violated the First Amendment and clearly stated that, in any event, First Amendment considerations were obviously implicated. *Nova University* v. *Board of Governors of the University of North Carolina*, 305 N.C. 156, 287 S.E.2d 872 (1982). The relevant point here, however, is that, in that case, Nova discovered that two days before the agency decided to deny it a license, the president of the University of North Carolina had privately circulated a memorandum to the agency urging it to deny Nova's application, among other reasons, because Nova would "compete" with local institutions and that if such a program was needed in North Carolina it should be provided by the University of North Carolina.[11]

Because undetected factors like this can so easily become surreptitious considerations in the agency decision, it is especially important that a court make an independent *de novo* review of the grounds for denying a license to conduct an educational program by an accredited university.

2. THE FIRST AMENDMENT DOES NOT PERMIT DENIAL OF A LICENSE TO OPERATE AN EDUCATIONAL PROGRAM ON THE GROUND THAT THERE IS A "RISK" THAT IT WILL BE "SUBSTANDARD."

In affirming the agency decision, the court below applied a "risk" standard; that is, an educational program may be denied a license not because it actually falls within

[11]We have reproduced this memorandum in the appendix, pp. 58-63.

the class the legislature has a right to prohibit, but because there is a "risk" that it might be within that class.

The court below noted that the statute involved here grew out of a need to control diploma mills and other fraudulent institutions (App. 2; 483 A.2d at 1176). According to the court, "It is against this statutory background that this case arose" (App. 6; 483 A.2d at 1177).

To assure that no such institutions would be regulated, the court below ruled that a license may be denied whenever there is a "risk" that an educational program will fall into the prohibited class (App. 37; 483 A.2d at 1191).

The Court of Appeals found that:

> The Commission in denying a license is not deciding that an educational institution is in fact "substandard, transient, unethical, deceptive, or fraudulent," D.C. Code § 31-1601(1) (1981), but rather that the applicant's failure to meet District criteria creates the probability that the harms with which the District is concerned will occur

(App. 24-25; 483 A.2d at 1186).

The most that the Court of Appeals could say was that the Commission's decision was justified because of the "potential for harm," *i.e.*, because of the possibility that Nova's program *might be* substandard. The Court of Appeals could not even confirm this judgment on its own; it could find only that the Commission's decision was "not unreasonable":

> [T]he Commission's perception of the potential for harm was not unreasonable . . . .

(App. 25; 483 A.2d at 1186).

For that reason, the court below concluded that:

> [I]n denying Nova a license the Commission is

> not holding that Nova's program is in fact substandard, but rather that certain deficiencies present an unacceptable risk that the program will be "substandard" . . . .

(App. 37; 483 A.2d at 1191).

Petitioner contends that, under the First Amendment, Nova can be denied a license only on the ground that its proposed program *is* "substandard," not on the ground that there is a "risk" that it will be "substandard" or that there is a "not unreasonable" chance of a "potential for harm."[12]

When the state may regulate speech that has only a *potential* for causing harm and when it may forbid speech only when it *actually* causes harm, has been discussed by this Court in two recent cases. *In re Primus,* 436 U.S. 412 (1978); *Ohralik* v. *Ohio State Bar Association,* 436 U.S. 447 (1978). In these two cases, the Court drew the line between commercial speech, on the one hand, and political speech, on the other. Both cases involved lawyer solicitation, in *Ohralik,* for pecuniary gain and, in *Primus,* as an exercise of political expression. In *Ohralik* (commercial speech), the state was permitted to adopt a "prophylactic

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[12]It should be noted that the reason the court found only "potential" for harm and a "risk" that the program would be substandard, was *not* because the program had not yet been offered in the District of Columbia. Obviously, a judgment must be made as to what the program would be when offered because the program cannot be offered without a license. But that is not the "potential" or "risk" the court was talking about. This program was being offered in 11 states; it had a history. It could have been judged in actuality. A decision could have , and should have been made as to whether this program, proposed for the District of Columbia, was, or was not, "substandard," as proposed. The Court of Appeals never made that decision. Instead, it affirmed the agency decison, *not* on the ground that this proposed program was "substandard," but that there was a "risk" that it would be. Under the First Amendent, this is not enough.

measure," just as the court did here (App. 24; 482 A.2d at 1186), to prevent the harm before it occurred, despite the fact that particular instances of solicitation may not involve the overeaching that the regulation was designed to prevent. On the other hand, in *Primus* (which involved solicitation by a civil liberties lawyer unmotivated by commercial gain), the state was permitted to prevent this solicitation only on proof of the kind of misconduct at which the regulation was directed.

This line between commercial speech and political expression was drawn by the Court in both cases. In *Ohralik,* the Court observed:

> [A]ppellant errs in assuming that the constitutional validity of the judgment below depends on proof that his conduct constituted actual overreaching . . . .
>
> Appellant's argument misconceives the nature of the State's interest. The Rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs. The Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert.

Ohralik, 436 U.S. at 464.

* * *

> It . . . is not unreasonable, or violative of the Constitution, for a State to respond with what in effect is a prophylactic rule.

Id. at 467.

Where the solicitation was engaged in by a civil liberties lawyer who was not soliciting a client in the hope of a fee, the Court reached the opposite conclusion and rejected the

contention that solicitation could be prohibited under a general prophylactic rule:

> At bottom, the case against appellant rests on the proposition that a State may regulate in a prophylactic fashion all solicitation activities of lawyers because there may be some potential for overreaching, conflict of interest, or other substantive evils whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman. Under certain circumstances, that approach is appropriate in the case of speech that simply "propose[s] a commercial transaction," *Pittsburgh Press Co. v Pittsburgh Commission on Human Relations,* 413 U.S. 376, 385 (1973). *See Ohralik*, 436 U.S. at 455-59. In the context of political expression and association, however, a State must regulate with significantly greater precision.
>
> Appellee contends that the disciplinary action taken in this case is part of a regulatory program aimed at the prevention of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, lay interference, and other evils that are thought to inhere generally in solicitation by lawyers of prospective clients, and to be present on the record before us. We do not dispute the importance of these interests. This Court's decision in *Button* makes clear, however, that "[b]road prophylactic rules in the area of free expression are suspect," and that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Button,* 371 U.S. at 438, *see Mine Workers v Illinois Bar Assn.* 389 U.S. at 222-23.

Primus, 436 U.S. at 432-33.

The Court struck down the regulations because

> the Disciplinary Rules in question permit punish-

> ment for mere solicitation unaccompanied by proof of any of the substantive evils that appellee maintains were present in this case.

Id. at 433.

The Court then drew the line between commercial speech and non-commercial speech:

> Although a showing of potential danger may suffice in the former context [commercial speech] appellant may not be disciplined unless her activity in fact involved the type of misconduct at which South Carolina's broad prohibition is said to be directed.

Id. at 434.

The question in this case is on which side of the line the speech here – an educational program offered by an accredited, non-profit university – falls. Is it governed by the rule applied in *Ohralik* or is it limited by the rule in *Primus*?

Interestingly enough, the court below did not even cite *Ohralik,* let alone attempt to distinguish *Primus.* This is especially curious because both sides extensively discussed these cases in their briefs. The reason these cases were irrelevant for the court below was that, for it, this case did not involve even commercial speech, as was involved in *Ohralik.* The court below easily affirmed the Commission's prohibition against Nova's offering this educational program because, for it, the state was regulating mere conduct, which did not rise even to the level of commercial speech; this was simply a business regulation:

> The statute at issue here is a business regulation . . .
>
> (App. 29; 483A.2d 1188)

* * *

> . . . . Educational institutions have no inherent or constitutional right to confer degrees; rather, degree conferral is business conduct, a corporate privilege . . . . Schools are not shielded by the First Amendment from governmental regulation of business conduct deemed detrimental to the public merely because they are engaged in First Amendment activities

(App. 13; 483 A.2d at 1181).

Based on this kind of reasoning, the court found that this case "implicate[s] First Amendment rights tangentially, if at all" (App. 29; 483 A.2d at 1188).

Thus, the Court of Appeals concluded (App. 20-21; 483 A.2d at 1184-85), this case is governed by the principles enunciated in *United States* v. *O'Brien,* 391 U.S. 367 (1968), in which this Court upheld a statute making it a criminal offense to burn a draft card. For the court below, this case involved only an act (degree conferral) and, therefore, the only question was the incidental effect the prohibition might have on First Amendment freedoms.

To say that this case involves only a business regulation to which *O'Brien* is applicable, however, is to "win the game by sweeping all the chessmen off the table."[13] The question is, is the offering of degree courses so closely intertwined with speech that the First Amendment is directly implicated?

In *Maryland* v. *Joseph H. Munson Co., Inc.,* __ U.S. __, 104 S.Ct. 2839 (1984), this Court struck down a statute that forbade a charitable organization from paying more than 25% of the amount raised for fundraising expenses. This Court could have concluded that the First Amend-

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[13]L. Hand, "Mr. Justice Cardozo," in The Spirit of Liberty 100 (1959).

ment was not implicated because the state was only regulating fundraising (just as the court below, in the instant case, found that the First Amendment was not implicated because only the business of degree conferral was being regulated). In *Munson,* however, this Court, relying on *Village of Schaumburg* v. *Citizens for a Better Environment,* 444 U.S. 620 (1980), ruled "that charitable solicitations are so intertwined with speech that they are entitled to the protections of the First Amendment," *Munson,* __ U.S. at __, 104 S.Ct. at 2849. In the same way, the offering of an educational program that may lead to a degree is so obviously intertwined with speech that First Amendment concerns are inevitably involved.[14]

Obviously, the First Amendment places limits on the extent to which the state may regulate an educational program offered by an accredited university – even though the state is permitted to regulate the conferral of a degree. As the North Carolina Supreme Court recently stated:

> [B]y whatever name it is called, all that Nova does in North Carolina is teach. To say that it is conducting a "degree program" which is somehow different from or more than mere teaching, as the Board would have it, is nothing more than the Board's euphemization. Teaching is teaching and learning is learning notwithstanding what reward might follow either process.

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[14]This Court has considered, or is considering, a number of cases in which the First Amendment places restrictions on the regulation of activities that are closely intertwined with free speech rights. For example, a school board may regulate the accession and de-accession of books in a library, but the First Amendment places some restrictions on the extent of the regulation. *Board of Education, Island Trees Union Free School District* v. *Pico,* 457 U.S. 853 (1982); the Securities and Exchange Commission may regulate investment counselors, but what about investment counselors who counsel by way of newsletters? *See Lowe* v. *SEC, cert. granted,* ____ U.S. ____, 105 S.Ct. 81 (1984).

Nova University v. *Board of Governors of the University of North Carolina,* 287 S.E.2d at 881.

The North Carolina Supreme Court went on to state:

> What [the Board] ask[s] is the power to regulate and license Nova's right to teach which is a restriction on freedom of speech.
>
> * * *
>
> Teaching and academic freedom are "special concern[s]" of the First Amendment to the United States Constitution . . . . The freedom to engage in teaching by individuals and private institutions comes within those liberties protected by the Fourteenth Amendment to the United States Constitution.

Id. at 877-78. *See, e.g., Keyishian* v. *Board of Regents of the University of the State of New York,* 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom . . . The First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classrom"); *Shelton* v. *Tucker,* 364 U.S. 479, 487 (1960); *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250 (1957).

Even assuming the state may prohibit the offering of degree programs that are "substandard," it nevertheless may not exercise general regulatory control over such programs.[15] Whether it has unconstitutionally done so is the question here.

The *Munson* case has another important bearing on the case at bar. In *Munson,* the Court held that the statute limiting fundraising expenditures to 25% must fall because "there is no necessary connection between fraud and

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[15]In *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 313 (1978), Justice Powell stated that the First Amendment was properly invoked in support of a university's rights to choose its students.

high solicitation and administrative costs." *Munson,* ____ U.S. at __, 104 S.Ct. at 2850. Similarly, here, there is no necessary connection between the absence of a local library owned by the school and the absence of full-time local faculty, on the one hand, and the quality of the educational program, on the other. In judging an educational program, it is not enough to deny it a license because, in many cases, the absence of a local library and the absence of full-time local faculty reflects a "substandard" program, just as it is not enough to say that most charitable causes that spend more than 25% of their contributions on fundraising are fraudulent and, therefore, we will prohibit all charitable fundraising in which more than this amount is spent. In a case like the one at bar, as in *Primus,* the question must be whether *this* educational program lacks the requisite quality. The court must focus on the quality of the education that is being provided, not on general indicia that suggest that the program may be "substandard." In this sense, the challenged regulatory scheme is overbroad, just as it was in *Munson* and *Primus.*

The court below commendably recognized that "regulation of schools in the name of quality not only poses risks to First Amendment freedoms but could have the effect of discouraging the innovation, diversity, and vitality that we value in a pluralistic society" (App. 27; 483 A.2d at 1187). The danger of such discouragement is especially acute here becauses the Commission "inquire[d] into faculty qualifications, library resources, and curriculum content" (App. 18; 483 A.2d at 1183).

Nevertheless, the court below justified this denial of a license to Nova because this was a "prophylactic" measure (App. 24; 483 A.2d at 1186), designed to "prevent harm before it occurs." *Id.* This is a fundamental error.

3. NOVA'S EDUCATIONAL PROGRAM IS NOT "SUBSTANDARD."

Whether Nova's educational program is "substandard," to use the statutory phrase (D.C. Code § 31-1601(1) (1981), must be decided in context.

This is a small, experimental program to be offered to 20-25 students in the District of Columbia. Each of the students must have received a master's degree from an accredited university and must be (and have been for at least five years) employed in a position with public administration responsibilities (Finding Nos. 10, 26, App. 39, 42).

The program takes a minimum of three years to complete and is the equivalent of one year of full-time study. Thus, the program in the District of Columbia would involve approximately 20 to 25 one-third-time students, or the equivalent of seven or eight full-time students (Finding No. 23, App. 41-42).

There is no question about the *real* quality of the program; it has been applauded by leading public administrators all over the country. Professor Montgomery testified that it was equal to Harvard's program, where he taught (III: 5-45). Other prominent academicians were prepared to testify similarly, but the Commission did not have time to hear them (II: 232, 236-38).

It is in this context, we contend, that, constitutionally, a *court* must decide whether Nova's program is "substandard." D.C. Code § 31-1601(1) (1981).

A. The Library Issue

To require a library for an external degree program offered to the equivalent of eight full-time students is an impregnable barrier to entry and essentially stops the external degree movement dead in its tracks at the state line.

This is especially true, where, as here, the Commission insisted that the library be staffed by a full-time, trained librarian.[16]

The external degree movement is one of the most exciting recent developments in higher education[17], a movement which has its opponents for reasons which have nothing to do with quality. It is well known that the easiest way to deny a license to an external degree program is to demand a library at every location where the program is offered. As a practical matter, such a requirement is impossible to meet.

To determine whether the lack of its own library in the District of Columbia renders Nova's program "substandard," the Court must also consider the fact that Nova made formal arrangements with Howard University and George Mason University for Nova students to use the libraries at these local universities (App. 33; 483 A.2d at

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[16]The court below noted that the Commission denied Nova a license "without prejudice to Nova renewing its application, and offered to explain to Nova how it could meet the faculty and library requirements" (App. 9; 483 A.2d at 1179).

What the court did not say was that Nova did request the Commission to advise it as to what the Commission would deem adequate (See letter of February 16, 1982, App. 64-65). The Commission never made a substantive written reply to Nova's request.

However, oral discussions ensued. As a result of these oral discussions, Nova offered to provide its own library of 3,000 volumes, to be augmented by 500 volumes a year, to be housed in the District. This proposal was satisfactory to the Commission.

The parties were unable to agree, however, on the staffing of this library. The Commission insisted on a trained, *full-time* librarian within six months or when 35 students were enrolled in Nova's District of Columbia program, whichever came first. Thus, the District insisted on a full-time, trained librarian for a library of 3,000 volumes, servicing from 20 to 25 part-time students.

[17]*See* App. 66-67.

1190). Nova students in the District of Columbia also have available to them the Library of Congress and other local public libraries (II:161-62). In addition, Nova provides each student with a library of his or her own of approximately 50 volumes and approximately 50 additional items of written material. Nova students also have locally available access to computer terminals which, in turn, access vast amounts of research materials.

In these circumstances, does the lack of its own library in the District of Columbia render Nova's program "substandard"? Did the Commission constitutionally apply the statute and regulations to these facts? Did the Commission unconstitutionally refuse to waive the library requirement on these facts?

The court below never addressed these questions. Purporting to consider whether the regulations were unconstitutionally applied, the court below ruled only that:

> We do not believe it can be accurately said that the licensing criteria in general and as specifically applied to Nova are not generally recognized indicia of legitimate and minimally qualified institutions of higher learning. Moreover, the regulations expressly recognize that the criteria will not apply equally in all situations, thereby providing the flexibility essential to ensure quality and legitimacy without discouraging diversity and innovation in higher education or injuring nascent education institutions. In this case, the Commission's perception of the potential for harm was not unreasoanble . . . .

(App. 25; 483 A.2d at 1186).

Despite the length of its opinion, this is as close as the court below came to addressing whether the application of

the regulations to the particular facts of this case constituted an as-applied violation of the First Amendment.

B. The Faculty Issue

The faculty issue too is a red herring. Nova's faculty in this program is simply outstanding (Finding No. 10, App. 39).[18]

The Commission insisted on some full-time faculty resident in the District of Columbia, but it failed to explain what a full-time faculty person would do for 20 to 25 part-time students, the equivalent of 7 or 8 full-time students. The requirement seems to be a formal one rather than a practical one, especially in light of the fact that students in this program are exposed to a wide range of teachers. Each teacher relates to the student in terms of the teacher's own subject matter and teaching design. A full-time teacher in the District of Columbia in this program would stick out like a useless sore thumb that has no place in the structure of the program. The Commission's concern purports to be

> [t]he importance in doctoral programs of face-to-face interaction between faculty and students, particularly for supervision and counseling during research projects.

(App. 35; 483 A.2d at 1191).

But the presence of a full-time faculty member would not necessarily provide this interaction and the absence of full-time faculty would not necessarily mean that this interaction would be absent. This is the constitutional infirmity in the Commission's and the court's inflexible yardstick.

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[18]Incidentally, the same teachers teach in every cluster so it is not the case that students in outlying areas get the less qualified teachers.

The faculty-student interaction that Nova, as well as the Commission, wishes to encourage can be created in ways other than by full-time faculty resident in the District of Columbia. For example, both the full-time faculty in this program and the preceptorial faculty could be required to have periodic, stated office hours when they would be available to students (with and without appointments). Nova, in fact, offered to provide just that and thus, in a meaningful way, accomplish what the Commission purported to want. But Nova's offer was rejected.

Moreover, the evidence at the hearing from teachers and students in the program reflected that there was meaningful interaction between faculty and students in the program. For example, one faculty member, who had taught graduate students at both American University and George Washington University and was then teaching at Nova University testified that "the exchange that I have with [the students] I think is a superior one in terms of the time I am able to spend with them . . . . I don't recall myself as a student, even at Harvard University, ever having had the chance to get to know my professors at the level I think the Nova students have had a chance to exchange their views with me on an informal, off-the-record, relaxed basis" (III:49).

A Nova graduate from this program testified, "I was able to contact instructors locally and nationally as I needed them, and even now I maintain some communication with a couple of them." (III:59-60).

CONCLUSION

This case will decide whether the most important egalitarian movement in higher education in the last gene-

ration — the external degree movement — will be stymied at the state line.[19]

If an external degree program can be required to own its own library and have full-time faculty at each location where it is offered, it simply cannot operate.

The issues involved are worthy of this Court's attention. For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[19]In the appendix, we have cited and quoted authorities concerning the importance of the external degree movement in American higher education (App. 66-67).

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 83-234

NOVA UNIVERSITY, PETITIONER,

v.

EDUCATIONAL INSTITUTION LICENSURE COMMISSION, RESPONDENT.

Petition for Review of a Decision of the Educational Institution Licensure Commission

(Argued March 6, 1984 Decided November 9, 1984)

Hershel Shanks for petitioner. *Steven A. Standiford* also entered an appearance.

Lutz Alexander Prager, Assistant Corporation Counsel, with whom *Judith W. Rogers*, Corporation Counsel at the time the brief was filed, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief, for respondent.

Before MACK and NEWMAN, *Associate Judges*, and GALLAGHER, *Associate Judge, Retired.*

NEWMAN, *Associate Judge*: Nova University (Nova) seeks review of an Order of the Educational Institution Licensure Commission (Commission) denying Nova's application for a license to offer Doctorate of Public Administration degree courses in the District of Columbia. The Commission denied the license, without prejudice, on the grounds that Nova had not complied with the Dis-

trict's licensing statutes and regulations with respect to adequate full-time faculty and adequate library resources.

Nova challenges the denial of its application for a license on the grounds that: (1) D.C. Code § 29-815 (1981), the District's licensing statute, is not applicable to schools, such as Nova, whose degrees are conferred outside the District of Columbia; (2) D.C. Code § 29-815 is unconstitutional on its face and as applied to Nova because it violates the First Amendment; (3) D.C. Code § 29-815 and the regulations guiding the issuance of licenses are unconstitutionally vague; and (4) the Commission's denial of a license was arbitrary, capricious, and unsupported by substantial evidence in the record.

We disagree with each of Nova's contentions, and therefore affirm the Commission's decision.

I.

A preliminary review of the legislation relevant to this case and its history is helpful to place in context the issues raised by Nova. In 1929, the District of Columbia was not only the capital of the United States, but the "capital" for practically all diploma mills operating not only in the District, but throughout the United States and the world. S. REP. NO. 611, 70th Cong., 1st Sess. (1928). This dubious distinction resulted from the District's lax laws relating to the incorporation of educational institutions, the power these institutions had to confer degrees under their general charters, and the opportunity to advertise themselves as operating under the authority of the United States Government or Congress. *Id.* at 2. Hundreds of fraudulent institutions of "learning" incorporated in the District and sold degrees from baccalaureate to doctoral in every conceivable field of study with little or no academic work; in addition,

the charters themselves were sold to individuals who carried on the "educational" programs in other states and countries. *Id.* at 2. At the urging of the United States Attorney's Office, local citizens and schools, sister jurisdictions and foreign countries, Congress enacted a statute "to Regulate Degree-Conferring Institutions in the District of Columbia." Pub. L. No. 70-949, § 586a, 45 Stat. 1504 (1929) (codified at D.C. Code §§ 29-815 to 818 (1981)). The statute requires licensing of all degree-conferring institutions incorporated in the District or incorporated in another state but operating in the District, and is set out in relevant part below:

> § 29-815. License to confer degrees—Issuance by Educational Institution Licensure Commission required.
>
> No institution . . . incorporated under the provisions of this chapter shall have the power to confer any degree in the District of Columbia or elsewhere, nor shall any institution incorporated outside of the District of Columbia . . ., undertaking to confer any degree, operate in the District of Columbia, unless . . ., by virtue of a license from the Educational Institution Licensure Commission, which before granting any such license may require satisfactory evidence:
>
> (1) That in the case of . . . an incorporated institution, a majority of the trustees, directors, or managers of said institution are persons of good repute and qualified to conduct an institution of learning;
>
> (2) That any such degree shall be awarded only after such quantity and quality of work

> shall have been completed as are usually required by reputable institutions awarding the same degree . . .,
>
> . . .
>
> (4) That considering the number and character of the courses offered, the faculty is of reasonable number and properly qualified, and that the institution is possessed of suitable classroom, laboratory, and library equipment.

D.C. Code § 29-815 (1981).

The statute provides for criminal penalties against anyone "who shall, directly or indirectly, participate in, aid, or assist in the conferring of any degree by any unlicensed . . . institution . . . . D.C. Code § 29-819 (1981).

In 1977, the Council of the District of Columbia established the Educational Institution Licensure Commission to perform licensing functions under D.C. Code § 29-815. *See* D.C. Code § 31-1601 to 1608 (1981). The purpose of this legislation is outlined in its opening section and set out, in part, below:

> [T]o provide for the protection, education, and welfare of the citizens of the District of Columbia, its private educational institutions, and its students, by:
>
> (1) Establishing minimum standards concerning quality of education, ethical and business practices, health and safety, and fiscal responsibility to protect against substandard, transient, unethical, deceptive, or fraudulent institutions and practices;

(2) Prohibiting the granting of false or misleading educational credentials;

(3) Regulating the use of academic terminology in naming or otherwise designating educational institutions;

(4) Prohibiting misleading literature, advertising, solicitation, or misrepresentation by educational institutions or their agents.

D.C. Code § 31-1601 (1981).

In 1980, the Council amended the 1977 statute, giving legislative sanction to regulations previously promulgated by the Commission's predecessor, the Board of Higher Education. D.C. Code § 31-1606(a) (1981). These regulations set forth the procedures and criteria by which licenses are issued and revoked. *See* Regulations Relating to the Licensing of Institutions Which Confer Degrees (1978) [hereinafter Regulations].

Section III of the Regulations contains eleven criteria the Commission is to consider in issuing licenses, involving inquiry into: institutional control; administrative staff and procedures; financial resources; number and quality of faculty; curricula, correspondence, extension, and summer session programs; admission requirements; library; physical plant and equipment; student personnel, health, and recreational services; and institutional publications. Applicants for a license are required to submit a statement as to how they plan to meet the criteria or give reasons why they consider themselves justified in not meeting a particular requirement. Regulations at § III (1)-(11). The regulations provide for flexibility, recognizing that "the . . . criteria will not be equally applicable to each institution wishing to award degrees." *Id.*

Applicants are entitled to a *de novo* hearing prior to the denial of a license, and to judicial review if a license is denied. *Id.* at § IV (e), (4) (2).[1]

II.

It is against this statutory background that this case arose. Nova University is a non-profit corporation organized and existing under the laws of Florida. In addition to undergraduate, graduate, and professional curricula taught at its home campus in Fort Lauderdale, Nova has instituted a variety of field-based, or external degree programs, designed to lead to the conferral by Nova in Florida of various degrees for professional persons. The field-based program of concern here is the Doctorate of Public Administration (DPA). Candidates for this degree are not required to fulfill traditional residence requirements at the Nova campus in Fort Lauderdale. Instead, they form "clusters" of 20 to 25 students who meet at a site in the areas where they live. At the time of the hearing, Nova was operating 11 clusters at various locations throughout the United States, with plans to increase to 15 in the near future.

Nova's DPA program requires a minimum of three years to complete and consists of nine sequences (analogous to semesters or quarters), with each sequence consisting of three to four "units" (analogous to courses). Six of the nine sequences are taught at the cluster sites, and each of the units meets once a month for approximately eighteen to twenty hours from Friday night

[1] Section IV of the Commission's Regulations regarding the applicant's right to a hearing and appeal parallel the District of Columbia Administrative Procedure Act, D.C. Code §§ 1-1509, -1510 (1981 & 1984 Supp.).

through Saturday. The remaining three sequences are taught in residence in Ft. Lauderdale. Each of these last about one week and occur annually.

The faculty of the DPA program consists of approximately nine professors from Nova's Florida campus and thirty-three national members, called preceptors. Generally, preceptors travel to the clusters to teach local course units and the Florida-based faculty teaches Florida units. Preceptors are academicians and practitioners in the public administration field, most of whom also teach at universities with traditional residence requirements. In addition, each cluster is coordinated by a cluster director, a contract employee living in the cluster area whose role consists of administrative and recruitment duties as well as counseling students.

In addition to preparing papers in anticipation of the unit sessions, students must complete a series of research papers, pass comprehensive written and oral examinations, and complete a final paper, an "analytical research project," which Nova deems to be the equivalent of a doctoral dissertation. The research papers are supervised by Nova's faculty in Ft. Lauderdale, during the annual week long conferences, as well as by telephone and written communication. The two-day comprehensive written examination is prepared and graded by the faculty in Florida, but administered locally. The oral examination is taken in Florida and administered by faculty members. If a student successfully completes the course work, comprehensive oral and written tests, and analytical research project, Nova awards a Doctor of Public Administration, under powers derived from its incorporation in Florida.

Since 1971, Nova has been accredited by the Southern Association of Colleges and Schools (SACS), the of-

ficially recognized regional accrediting association of the southeastern United States. Nova's accreditation was most recently affirmed for a ten-year period after a review in 1974-75 of its educational programs, including its external degree programs, such as the one here at issue. In 1980, SACS separately reviewed Nova's field-based programs, including the DPA program, and this review had no effect on Nova's accreditation.

In October 1980, Nova applied to the Commission for a license to offer DPA degree courses in the District of Columbia. In response to Nova's application, the Commission appointed a three-person evaluation team, composed of non-members of the Commission and approved by Nova, to visit Nova in Florida to determine whether Nova's DPA program met the District's statutory and regulatory criteria for licensing.

The team issued a report recommending denial of a license. Nova responded to the team report, pointing out what it believed were factual errors, and providing the Commission with additional information and proposals. The Commission then appointed a Task Force, made up of two Commission members, to evaluate the team's report and Nova's response. On March 4, 1981, the Task Force submitted its findings and concluded that the Commission should deny licensure. The Commission approved the recommendations of the site evaluation team and notified Nova of its intention to deny a license, the reasons for this intent, and Nova's right to request a hearing.

A *de novo* hearing was held before the Commission on August 19, 23, and 24, 1982. On January 19, the Commission rendered its decision denying Nova's license application, concluding that Nova failed to demonstrate that it would have adequate full-time faculty or adequate library resources in the District of Columbia as required

by D.C. Code § 29-815(4) and the Regulations § IV(e). Although the Commission denied the license, it did so without prejudice to Nova renewing its application, and offered to explain to Nova how it could meet the faculty and library requirements.

III.

As a preliminary matter, we must address Nova's contention that this court can and should avoid the constitutional questions raised in this case by interpreting D.C. Code § 29-815 as excluding Nova from the licensing requirement. Section 29-815 requires "any institution incorporated outside of the District of Columbia . . . undertaking to confer any degree, operate in the District of Columbia . . ." unless it obtains a license from the Commission. Nova suggests that we interpret the statute as reading "undertak[es] to confer any degree *in the District of Columbia.*" Such a reading would exclude Nova from the license requirement because Nova confers its degree in Florida.

In urging this statutory interpretation, Nova reminds us of the well-established rule of statutory construction—a court "will not pass on the constitutionality of an [a]ct . . . if a construction of the statute is fairly possible by which the question may be avoided." *United States v. Clark*, 445 U.S. 23, 27 (1980). *Accord, District of Columbia v. Edgcomb*, 305 A.2d 506, 510 (D.C. 1973); *see generally* 2A C. SANDS & SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 45.11 (4th ed. 1973 & 1984 Supp.). The operative words of this axiom, however, are *fairly possible*, for a court cannot avoid constitutional questions by interpreting a statute in a way that is unreasonable in light of the language, purpose, and history of the legislation. *See, e.g., Edward J. DeBartolo Corp. v. NLRB*, 103 S. Ct. 2926, 2933 & n.10 (1983).

Examining the language of § 29-815 we note the quite obvious fact that the statute does not contain the words Nova urges us to insert. Rather, the statute plainly requires degree conferring institutions incorporated outside the District to obtain a license to *operate* in the District without regard to where the degree is conferred.[2] "Operating" is defined as "maintain[ing] any facility or location in the District . . . through which education is offered or given, or educational credentials are offered or granted, and includes contracting with any person, group, or entity, to perform any such act." D.C. Code § 31-1602(11) (1981). Given this definition and the fact that no words in the statute limit the licensing requirement to schools conferring degrees *in the District*, this plain language alone is sufficient for this court to reject Nova's argument. We have stated on numerous occasions that when the language of a statute is clear and admits of no more than one meaning, we are not empowered to look beyond the literal words of the statute. *See, e.g., Davis v. United States*, 397 A.2d 951, 956 (D.C. 1979); *United States v. Stokes*, 365 A.2d 615, 618 (D.C. 1976); *Harrison v. J. H. Marshall & Associates*, 271 A.2d 404, 406 (D.C. 1970). Much less are courts free to insert words into a statute that is complete and clear on its face where, as here, the words would render the "operating" clause of the statute superfluous and be contrary to

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[2] *Compare Nova University v. The Board of Governors of the University of North Carolina*, 305 N.C. 156, 287 S.E.2d 872 (1982). North Carolina's licensing statute expressly authorizes licensing to confer degrees, and contains no licensing requirement to "operate." The North Carolina court held that the statute could not be construed beyond its terms to authorize the Board to require a license for Nova's teaching of degree-credit courses in North Carolina where the degree was to be conferred in Florida.

the clear intent of Congress. *See Hurst v. V & M of Virginia, Inc.*, 293 Md. 575, 446 A.2d 55, 56-57 (1982).

The language of the statute, as well as its legislative history, plainly indicate Congress' intention to *comprehensively* regulate degree conferring institutions operating in the District of Columbia, whether the institutions were incorporated in the District or were foreign corporations seeking to operate in the District.

IV.

We turn now to Nova's argument that § 29-815 violates the First Amendment "on its face" [3] and as applied to Nova. As discussed previously, D.C. Code § 29-815 requires private educational institutions incorporated in the District to obtain a license as a condition to conferring a degree. Nova does not challenge this aspect of the statute, stating that the District may arguably regulate the "conduct" of degree conferral. However, Nova contends that the additional statutory requirement that private schools incorporated elsewhere and which undertake to confer degrees obtain a license as a condition to "operating" in the District, is unconstitutional because it licenses and regulates "pure speech" on the basis of quality. Nova points out that it has the authority to confer degrees from the state of Florida and seeks only to *teach* its degree program in the District. Because the District has no extrajurisdictional power to regulate Nova's degree conferral, Nova contends that the District is *necessarily* licensing teaching.

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[3] A facial challenge in this context is an assertion that the statute is unconstitutional not only as applied to Nova, but also in any conceivable application. *See City of Los Angeles v. Taxpayers For Vincent*, 52 U.S.L.W. 4594, 4598-99 (1984); *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 104 S. Ct. 2839, 2852 n.13 (1984).

We reject this argument at the outset as well as the artificial conduct/speech distinction Nova draws because it has no practical or First Amendment substance. First, § 29-815 does not regulate or license teaching or "pure speech." The "operating" clause of § 29-815 merely subjects out-of-District schools to the same regulations as schools incorporated in the District, *e.g.* both have unfettered freedom to teach so long as no degree credits or degrees are promised or given. According to the Senate Report, "[i]nstitutions which do not undertake to confer degrees do not come within the purview of this bill." S. REP. No. 611, 70th Cong., 1st Sess., at 4 (1928). The 1929 congressional statute was described in its title as an amendment to the D.C. Code "Relating to Degree-Conferring Institutions." Pub. L. No. 70-949, § 586a, 45 Stat. 1504 (1929). The statute itself states that schools incorporated in the District are required to obtain a license "to confer a degree," and schools incorporated elsewhere "*undertaking to confer a degree*" must obtain a license to "operate" in the District. The regulations setting forth the criterion for licensing are entitled "Regulations Relating to the Licensing of Institutions which Confer Degrees." The statutory penalties apply to anyone "who shall, directly or indirectly, participate in, aid, or assist in the conferring of any degree by any unlicensed . . . institution . . . ." D.C. Code § 29-819 (1981). And in *Kraft v. Board of Education*, 247 F. Supp. 21, 25 (D.D.C. 1965), *cert. denied*, 386 U.S. 958 (1967), the court affirmed revocation of a license to award a degree, observing that the absence of a license did not prevent schools from teaching non-degree subjects or programs in the District. In short, Nova would not have needed to apply to the Commission for a license (an application requesting "a License to Offer Doctorate of Public Administration *Degree* Courses in the District of

Columbia") nor would Nova be before this court if it did nothing in the District of Columbia but teach.

Second, the District's power to regulate Nova is no different than its power to regulate educational institutions incorporated in the District. Nova does not and could not contest the power of the District to regulate degree conferral by its own institutions. *Compare New Jersey Board of Higher Education v. Shelton College*, 90 N.J. 470, 448 A.2d 988 (1982) (*Shelton II*). Educational institutions have no inherent or constitutional right to confer degrees; rather, degree conferral is business conduct, a corporate privilege conferred by the state of incorporation. *Id.* at 990; *National Association of Certified Public Accountants v. United States*, 53 App. D.C. 391, 292 F. 668 (1923); *Townshend v. Gray*, 62 Vt. 373, 19 A. 635, 636 (1890). Schools are not shielded by the First Amendment from governmental regulation of business conduct deemed detrimental to the public merely because they are engaged in First Amendment activities. *See generally Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937); *Grosjian v. American Press Co.*, 297 U.S. 233, 250 (1936); *Kunda v. Muhlenberg College*, 621 F.2d 532, 550-51 (3d Cir. 1980); *Shelton II*, *supra*, 448 A.2d at 996-97; *State ex rel. v. Clarksville School*, 636 S.W.2d 706 (Tenn. 1982). Although Nova has the power to confer degrees from the state of Florida, as a foreign corporation, Nova has no constitutional right to operate its degree program in the District of Columbia, *e.g.*, *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117, 119 (1968); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 181 (1868), and the District may impose the same restrictions upon Nova as it imposes upon its own degree-conferring schools. *E.g. Northwestern National Life Insurance Co. v. Riggs*, 203 U.S. 243 (1906); *Orient Insurance Co. v. Daggs*, 172

U.S. 557 (1899); *Paul v. Virginia, supra*; *Watergate South, Inc. v. Duty*, 464 A.2d 141, 144 n.5 (D.C. 1983).

Finally, the most serious flaw in the conduct/speech distinction drawn by Nova is that it has no First Amendment relevance and, if accepted, would undermine the very freedoms Nova asserts in this case.[4] As we have already stated, in requiring schools incorporated outside the District to obtain a license to operate degree programs in the District, the District is regulating no more and no less than when it requires schools incorporated in the District to obtain a license to confer a degree. The question in each case is whether the school meets minimal academic standards as set out in the statute and regulations. Yet under the conduct/speech distinction drawn by Nova, Nova may engage in exactly the same activities in the District as a college incorporated in the District, and although D.C. Code § 29-815 would have an identical impact on both schools, the District is absolutely prohibited by the First Amendment from regulating Nova but not from regulating a District school, merely because Nova is incorporated elsewhere. We cannot accept a theory of the First Amendment that conditions its protection on *where* a school is incorporated.

Our holding that D.C. Code § 29-815 regulates the business conduct of degree conferral and leaves schools free to teach does not end our First Amendment inquiry, for although degree conferral and the operation of degree programs are "privileges" granted by the District, the District can not place conditions on the receipt of these

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[4] As to the problems with the conduct/speech distinction in First Amendment analysis, *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-7 (1978); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1493-96 (1975).

privileges that themselves violate the Constitution or require the receipt to forego the exercise of fundamental rights. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967); *Speiser v. Randall*, 357 U.S. 513, 518 (1958). Nor can the District regulate its businesses in ways that impinge on fundamental rights. *E.g., Frost Trucking Co. v. Railroad Commission of California*, 271 U.S. 583, 593-99 (1926).

Educational institutions, as well as individuals, have a First Amendment right to teach and to academic freedom. *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978); *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (dicta); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Keyishian, supra*, 385 U.S. at 603;[5] *see generally* Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817 (1983). In his concurring opinion in *Sweezy v. New Hampshire*,[6] Justice Frankfurter characterized academic freedom as the right of an educational institution to be free from direct or indirect "governmental intervention in the intellectual life of a university," 354 U.S. at 262, and summarized the "four essential freedoms" that constitute academic

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[5] Prior to application of the First Amendment to the states, the Supreme Court recognized the right to teach as a fundamental freedom protected by the Fourteenth Amendment. *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

[6] In *Sweezy*, the Court reversed the contempt conviction of a professor called before a one-man state investigative "team" to answer questions regarding, *inter alia*, the content of his lectures. Although the court's plurality opinion rested on due process grounds, the Court stressed the threat to academic freedom that the conviction presented. *Sweezy, supra*, 354 U.S. at 250.

freedom as the right of a university "'to determine for itself on academic grounds who may teach, what may be taught, and how it shall be taught, and who may be admitted to study.'" *Id.* at 263. The Open Universities in South Africa 10-12 (A statement of a conference of senior scholars from the University of Cape Town and the University of the Withwatersrand, including A. v. d. S. Centlivres and Richard Feetham, as Chancellors of the respective universities) (footnote omitted).

It cannot be gainsaid that D.C. Code § 29-815, by requiring educational institutions to obtain a license as a condition to operating a degree program and predicating that license on meeting District criteria interferes with an educational institution's operation. In particular, Nova was denied a license because the Commission found that its library and faculty resources did not meet District requirements. However, to say that D.C. Code § 29-815 constrains a degree-granting educational institution's freedom to make decisions as to how an educational program will be run, is not to say that the constraints violate the First Amendment. Not every limit on institutional autonomy also implicates academic freedom. *See Kunda v. Muhlenberg College*, 621 F.2d 532, 547 (3d Cir. 1980). The Supreme Court has recognized that First Amendment freedoms are not absolute and "the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest." *City Council of Los Angeles v. Taxpayers for Vincent*, 52 U.S.L.W. 4594, 4598 (1984) (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)). *See also Shelton II*, *supra*, 448 A.2d at 993-99.

In determining whether § 29-815 violates the First Amendment, we look first to whether the statute is content-neutral, for however valid the government's in-

terest in regulating, it generally cannot be pursued by discriminating between particular viewpoints and information. *E.g., City Council of Los Angeles v. Taxpayers for Vincent, supra,* 52 U.S.L.W. at 4598-99. The Supreme Court has consistently recognized that if the constitutional guarantee means anything, it means that, ordinarily at least, "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosely,* 408 U.S. 92, 95 (1972); *e.g., Consolidated Edison Co. v. Public Service Commission,* 447 U.S. 530, 537 (1980); *First National Bank of Boston v. Belloti,* 435 U.S. 765, 783 (1978); *Bates v. City of Little Rock,* 361 U.S. 516 (1960); *see generally* Farber, *Content Regulation and the First Amendment: A Revisionist View,* 68 GEO. L.J. 727 (1980); Redish, *The Content Distinction in First Amendment Analysis,* 34 STAN. L. REV. 113 (1981).

We think it evident that the general rule that forbids the government to regulate speech on the basis of content has no application to this case, for there is not even a hint of bias or censorship in Congress' enactment or the Commission's enforcement of D.C. Code § 29-815. In enacting § 29-815, Congress was not motivated by hostility to particular ideas, opinions, or educational philosophies,[7] nor was Congress concerned with harms that might occur from public exposure to particular information.[8]

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[7] *Compare Keyishian v. Board of Regents, supra,* and *Sweezy, supra,* where government intervention in university life was motivated by hostility to a political philosophy.

[8] *Compare Meyer v. Nebraska,* 262 U.S. 390 (1923), where the state invalidly prohibited the teaching of foreign languages because of concern that it prevented immigrant assimilation into American society; and *Linmark Assocs. Inc. v. Township of Willingboro,* 431 U.S. 85 (1977), where a township in-

The sole interest of Congress was to ensure that degree-conferring educational institutions incorporated or operating in the District met minimal academic standards—*whatever* their message was, and to protect the public against harms arising from the abuse and misuse of degree-conferring powers, harms that arose independently of any message or teaching that might or might not precede degree conferral. On their face, the statutory and regulatory criteria for licensing are content neutral, censoring no subject, opinion, or educational philosophy. And contrary to Nova's suggestion, we do not believe that Commission inquiry into faculty qualifications, library resources, and curriculum content necessarily makes the statute content-related or amounts to a constraint on academic freedom.[9] This inquiry is limited to *neutral, sound, academic* criteria, not intended or

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validly prohibited posting of For Sale signs in yards due to its belief that this information promoted "white flight" from neighborhoods.

[9] *See generally* Finkin, *supra* at 854, where the author distinguishes institutional autonomy from academic freedom, and concludes that when the state does not directly regulate teaching or research, the question of whether a restraint on institutional autonomy is also an unconstitutional restraint on academic freedom will depend in each case on the purpose and effect of governmental action, "its compatibility with the academic enterprise, whether procedural safeguards for the institution are available, and the likely effect of the inquiry on academic freedom and the conduct of educational affairs." *Id.* at 855. In this regard, the author contrasts the loyalty-security investigations of professors in the 1950's, *e.g., Sweezy, supra,* the purpose and effect of which were "bluntly antithetical" to academic freedom, with state regulation of degree-conferring institutions on the basis of sound academic criteria, which might involve inquiry into faculty quality and content of curriculum, but does not constitute an impermissible invasion of academic freedom.

likely to intrude upon the legitimate intellectual life of a university, but to ensure that when a university confers a degree, it does indeed have an intellectual life and the minimal resources essential to support that life. Nor is there any suggestion that the Commission denied Nova a license because of the particular subjects it teaches, content of books it provides, or views of its teachers. Nova was denied a license because the Commission found that Nova's plans to use Howard University's library facilities rather than providing their own, and Nova's use of field-based teachers with no resident faculty in the District, did not meet the District's requirements for adequate faculty and library resources. Although application of the statute to Nova may be burdensome in a financial and administrative sense, and limits Nova's institutional prerogatives, we do not believe these constraints intrude upon Nova's right to academic freedom or free speech. It cannot be said that requiring a library and teachers is incompatible with the academic endeavor or with intellectual freedom within a university.[10]

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[10] *See Kunda v. Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980), a Title VII case in which the court held that a court order reinstating and granting tenure to a professor did not interfere with the academic freedom of a university where the employment decision was not made on academic grounds, noting that "[i]t does not follow that because academic freedom is inextricably related to the educational process it is implicated in every employment decision of an educational institution." *Id.* at 547.

Nova contends that the expert testimony it presented, particularly that of the Chairman of Harvard University's Government Department, compels us to overturn the Commission's decision. By a post-argument submission, Nova calls our attention to a recent decision of the United States Supreme Court in *Secretary of State of Maryland v. Joseph H. Munson Co.*, 104 S. Ct. 2839 (1984). We find nothing in *Munson* which compels a decision contrary to the one we reach. In

When governmental regulation, as in this case, is not aimed at the content of speech but nevertheless has an incidental impact on the exercise of communicative activity, the regulation will not violate the First Amendment so long as it does not *unduly* restrict the communication of ideas. *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941); *see also Konigsberg v. State Bar*, 366 U.S. 36, 50-51 (1961).

In *United States v. O'Brien*, 391 U.S. 367 (1968), the Supreme Court set forth the framework for reviewing a viewpoint neutral regulation of this kind:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the supression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

We have already addressed the power of the District to regulate the business activities of its own educational

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the hearing before the Commission, there was conflicting expert testimony. For example, the Dean of the School of Community and Public Affairs at Virginia Commonwealth University was critical of the faculty arrangements provided by Nova, and questioned whether these provisions would meet the national standards of the National Association of Schools of Public Affairs. There was other expert testimony that was similarly critical, both as to faculty arrangements and as to library facilities. The Commission was entitled to choose which expert testimony it credited. *Citizens Association of Georgetown, Inc. v. District of Columbia*, 402 A.2d 36 (D.C. 1979) (en banc).

institutions and we have held that the District's interest in this case is not aimed at suppressing speech, but rather in preventing the harms that arise when educational institutions abuse their degree-conferring authority. Thus, the critical inquiries in this case are whether D.C. Code § 29-815 furthers a substantial interest and whether the effect of the statute on speech and academic freedom is no greater than necessary to protect the District's interest.

The interest that the District asserts is that of ensuring minimal educational standards among degree-conferring institutions within its borders. The substantial interest and broad discretion that the state has in regulating its schools and the quality of education provided to its citizens is also well established. *Meyer v. Nebraska*, *supra* note 8; *see also Vlandis v. Kline*, 412 U.S. 441 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971); *Hamilton v. University of California*, 293 U.S. 245, 260-62 (1934); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925); *Marjorie Webster Jr. College v. Middle States Association of Colleges and Secondary Schools, Inc.*, 139 U.S. App. D.C. 217, 221 & n.19, 432 F.2d 650, 654 & n.19, *cert. denied*, 400 U.S. 965 (1970).

The interest the District has in regulating degree conferral was well set out by the New Jersey Supreme Court in *Shelton College v. State Board of Education*, 48 N.J. 501, 226 A.2d 612 (1967) (*Shelton I*), in which the court upheld a licensing scheme similar to our own in the face of a First Amendment freedom of speech challenge.[11]

[11] The New Jersey statute prohibited the conferral of a degree or the "furnish[ing of] instruction" for the purpose of conferring degrees, except by licensed institutions. *Shelton I*, *supra*, 226 A.2d at 616. Following this decision, Shelton

In *Shelton I*, the court began by holding that New Jersey had the constitutional power to and interest in regulating private educational institutions, quoting Chief Justice Marshall's statement in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819): "That education is an object of national concern, and a proper subject of legislation, all admit." *Shelton I*, *supra*, 226 A.2d at 618. The court further found that regulation of degree conferral was especially appropriate "evidential as it is of academic achievement" and " 'intimately related to the public welfare' ". *Id.* (quoting ELLIOTT, THE COLLEGES AND THE COURTS at 200 (1936)). Rejecting Shelton College's suggestion that the public needed no protection from non-professional degree programs, the court noted:

> [G]overnment and private segments of our society look to the degree for evidence of achievement and capacity. . . . Indeed, . . . some or all of the study required for a bachelor degree is prerequisite for most professional degrees, and licensing authorities, . . . must depend upon the quality of the instruction given by the colleges, academic as well as professional.

College, a small religious school, moved to Florida, where it obtained a license to confer bachelor's degrees. Shelton returned to New Jersey eight years later and began to offer credit courses leading to a degree by the authority of Florida. This action spawned extensive litigation culminating in *Shelton II*, *supra*, in which the court upheld an injunction which prevented Shelton from awarding course credits or degrees in New Jersey without a license and rejected Shelton's claim that licensing violated their First Amendment right to exercise their religion. *See generally* Kirk, *Shelton College and State Licensing of Religious Schools: An Educator's View of the Interface Between the Establishment and Free Exercise Clauses*, 44 LAW & CONTEMP. PROBS. 169 (Spring 1981).

Shelton I, *supra*, 226 A.2d at 619. As to Shelton's suggestion that private accreditation societies are adequate to deal with the problem, the court responded that as useful as private accreditation societies are in developing standardization with respect to degrees, they "cannot stop the substandard school or close the out-and-out degree mill." *Id.* Finally, the court noted that educators themselves had called for stricter state regulation of academic standards for degrees since the turn of the century and quoted from a proposed model statute prepared in 1961 by the Council of State Governments, as "sum-[ming] up the public need for regulation" of institutions that confer degrees:

> It is the policy of this state to prevent deception of the public resulting from the conferring and use of fraudulent or substandard degrees. Since degrees, diplomas and similar measures of academic achievement are constantly used by employers in judging the training of prospective employees; by public and private professional groups in determining qualifications for admission to and continuance of practice; and by the general public in assessing the extent of competence of persons engaged in a wide range of activities necessary to the general welfare, regulation by law of such evidences of academic achievement is in the public interest. To the same end, the protection of legitimate institutions and of those holding degrees from them is also in the public interest.

Id. at 620.

These tenets were reiterated by the New Jersey Supreme Court in *Shelton II*.

Like the New Jersey Supreme Court, we find that the District's interest in this case is substantial. Indeed, as already discussed, such regulation is essential if the purposes of the statute are to be met. *See* discussion, *supra* at 9.

Nova contends that however substantial the District's interests are, they are not being furthered by the licensing statute. First, Nova points out that education in our society occurs in a national marketplace and that the District cannot prevent persons, including its own citizens, from receiving degrees from other jurisdictions with less stringent incorporation and degree conferral laws, and then returning to the District to use the degree. Second, Nova argues that the licensing criteria are not rationally related to determining whether an educational institution is substandard.

We do not agree that the licensing statute is ineffective in or unrelated to accomplishing the District's purposes. We reject at the outset any suggestion that because the District cannot impose its educational standards nationwide, the statute is ineffective and the District must forego all attempts to ensure that educational standards are met by those schools operating in the District. Moreover, Nova's assertion that the licensing criteria are unrelated to determining whether an educational institution is substandard is not only incorrect but flows from the erroneous premise that nothing less than actual proved fraud or lack of quality would justify denying Nova a license. Section 29-815 is a prophylactic regulation—intended to prevent harm before it occurs. The Commission in denying a license is not deciding that an educational institution is in fact "substandard, transient, unethical, deceptive, or fraudulent," D.C. Code § 31-1601(1) (1981), but rather that the applicant's

failure to meet District criteria creates the probability that the harms with which the District is concerned will occur. We do not believe it can be accurately said that the licensing criteria in general and as specifically applied to Nova are not generally recognized indicia of legitimate and minimally qualified institutions of higher learning.[12] Moreover, the regulations expressly recognize that the criteria will not apply equally in all situations, thereby providing the flexibility essential to ensure quality and legitimacy without discouraging diversity and innovation in higher education or injuring nascent education institutions. In this case, the Commission's perception of the potential for harm was not unreasonable, and the efficacy of the District's efforts to prevent harm to prospective employers and students would be substantially diminished if the state could act only after injury occurred.

The next question we must ask is whether the effect of § 29-815 on the free speech and academic freedom of educational institutions is no greater than necessary to further the District's interests. Nova contends that the principle that statutes touching First Amendment freedoms must be narrowly drawn dictates that the District must aim specifically at the fraudulent educational institutions and the out-and-out diploma mill and leave "quality" determinations to private accrediting associations and the educational consumer. This argument not

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[12] *Compare Secretary of State of Maryland v. Joseph H. Munson Co., supra* note 10, in which the Supreme Court struck down as overbroad a Maryland statute prohibiting charitable organizations from paying more than 25% of the amount raised to fundraising activities because the statute operated on the "fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." *Id.* at 4880.

only ignores the practical difficulties of detecting illegal activities by educational institutions and successfully prosecuting them under criminal fraud laws but overlooks the fact that the District has a substantial interest in preventing degree conferral by non-fraudulent but nevertheless substandard educational institutions. And although private accrediting institutions serve a valuable role in providing information to the public regarding the academic standards at various schools, these organizations are voluntary and can do nothing to prevent the substandard or fraudulent school from conferring a degree. Requiring full disclosure from schools and letting the educational consumer choose is inadequate. That individuals may choose with full knowledge to spend their money for a degree that has no academic substance does not mean that the District may not act to foreclose that choice where it is inherently harmful to the integrity of legitimate educational institutions, employers, and the public in general.

Finally, Nova asserts that § 29-815 creates such substanial burdens on the exercise of First Amendment freedoms that it cannot be justified despite the District's substantial interest. Specifically, Nova points to the lengthy and expensive administrative process it went through only to be denied a license in the final analysis "merely" because Nova would provide no library of its own and would utilize national faculty rather than placing any faculty in the District. Although we recognize the burdens this statute places on Nova, we do not believe they amount to a First Amendment violation. There is simply no evidence that the length and complexity of the administrative process in this case arose from a lack of diligence on the Commission's part or of covert hostility toward Nova's educational program, or any particular subject taught or opinion held by Nova's teachers.

Nova's application was denied without prejudice and the record reflects that the Commission is prepared to exercise the flexibility provided for in the Regulations to accommodate Nova's external degree program. Requiring Nova to provide some resident faculty and a library for District students does not prevent Nova from implementing its unique field-based program—it merely requires Nova to devote more resources to the program in the District.

In conclusion, Nova has failed to demonstrate that the District's licensing requirement is inherently, or as applied to Nova, an unreasonable limitation of educational institutions' right to free speech and academic freedom. We are reassured in our conclusion by the fact that applicants for a license are entitled to extensive procedural protections, including judicial review, for we are not unmindful that regulation of schools in the name of quality not only poses risks to First Amendment freedoms but could have the effect of discouraging the innovation, diversity, and vitality that we value in a pluralistic society. Nevertheless, we believe that the very importance of these institutions to the citizens of the District and to society at large negate any suggestion that the state does not have a substantial and indeed compelling interest in regulation that advances the quality and integrity of higher education.

Requiring degree-conferring institutions to meet reasonable academic standards is not only in the best interests of the public, but also in the best interests of educational institutions, for in the last analysis, the viability of such institutions depends in large part on public esteem and support. The First Amendment cannot be used as a shield to protect substandard or fraudulent degree conferring educational institutions and the District

can insist that schools who operate degree programs in the District provide the minimal resources and education appropriate to the degree conferred.

V.

Nova next contends that the statutory standards for licensure violate the First Amendment because they are impermissibly vague. Having held that § 29-815 is not void on its face and has only an incidental and limited impact on speech, Nova's vagueness challenge can succeed

> only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 495 (1982) (footnote omitted).

In due process vagueness challenges we look to see whether the statute provides explicit standards so that the law gives "the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and prevents "arbitrary and discriminatory applications." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). *E.g., District of Columbia v. Gueory*, 376 A.2d 834 (D.C. 1977). Whether a statute is sufficiently precise will "depend in [large] part on the nature of the enactment." *Hoffman Estates v. Flipside Hoffman Estates, supra*, 455 U.S. at 498. Business regulations are not subject to a strict vagueness test, not only because the subject matter regulated is often more narrow, *e.g., Papa-*

christou v. City of Jacksonville, 405 U.S. 159, 162 (1972) (dictum; collecting cases), but also because businesses can be expected to investigate relevant legislation and plan behavior accordingly. *E.g., United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963). Additionally, the regulated enterprise often has the opportunity to clarify their standards through their own inquiry as well as through the administrative process. *See Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 49 (1966); *McGowan v. Maryland*, 366 U.S. 420, 428 (1961). Finally, perhaps the most important factor affecting the clarity that a law must have is whether it threatens to inhibit the exercise of constitutionally protected rights of free speech. *E.g., Grayned v. City of Rickford*, 408 U.S. at 109.

The statute at issue here is a business regulation that Nova has had ample opportunity to clarify. The licensing criteria at issue relate to the number of faculty Nova is required to provide and the type of library resources, implicating First Amendment rights tangentially, if at all. Applying the standard of review appropriate under these circumstances, Nova's facial challenge must fail, for the statute and regulations are sufficiently clear as applied to Nova.

D.C. Code § 29-815 requires Nova to have "faculty . . . of reasonable number" for the number and nature of courses taught, and the Regulations require, in relevant part, "a sufficient number of full-time teaching appointments to ensure continuity and stability of the educational program, as well as to provide adequate educational association between students and faculty." Regulations § III(4)(b). As to library requirements, § 29-815 requires Nova to "possess [] . . . suitable . . . library equipment" and the Regulations require that the library

have a "collection of books . . . adequate for the needs of the [particular] educational program [offered]; continuous acquisition of current library materials[;] . . . professionally trained staff[; and adequate] . . . seat-[ing] and work space." Regulations § III(8)(a)-(d). We simply cannot agree that Nova was not put upon notice by the language of the statute and regulations as well as the interaction with Commission staff prior to the hearing that using another school's library and relying exclusively on field-based professors in a doctoral program would not satisfy the District's requirements. Moreover, we note that the Commission has offered to meet with Nova to clarify exactly what Nova must do to meet District requirements. We are not persuaded that the standards did not give Nova "fair notice" of what was required.

Nova also contends that the statute and regulations provide insufficient standards for enforcement, permitting ad hoc and discriminatory action by the Commission on invidious and irrelevant grounds. However, Nova presents no evidence that the statute has been enforced in this case in a discriminatory manner or with the aim or effect of inhibiting free speech or academic freedom. Although the terms "adequate", "sufficient" and "reasonable" leave room for discretionary enforcement, the constitutional sufficiency of these terms cannot be judged in a vacuum. The context must be considered, *e.g.*, *American Communications Association v. Douds*, 339 U.S. 382, 412 (1950), because the context not only gives concreteness to what seems abstract, but it also demonstrates that despite its generality, a broad standard is all that sensibly may be expected if the Commission is to be equal to the sundry situations that may arise. Here the regulations acquire content not only from the overall objective of the statute to prevent fraudulent, substandard, tran-

sient and unethical degree conferring schools from operating in the District but also from the Commission's use of local reputable institutions offering similar programs as a reference point. Greater specificity, would not only be a practical impossibility, given the wide variety of educational programs and institutions the Commission must consider, but would infringe to a greater extent on legitimate educational choices. Finally, the potential for discriminatory or unconstitutional application of these standards is lessened by the procedural protections accorded to applicants under the statute and regulations. "No statute bears an absolute guarantee that it will always be applied within constitutional bounds; consequently, no such guarantee can be demanded." *Secretary of State of Maryland v. Joseph H. Munson Co., supra,* 104 S. Ct. at 2857 (Rehnquist, J., dissenting). At this stage we are not prepared to hold that the imprecision of these terms jeopardizes the entire statute. "Although it is possible that specific applications . . . may engender concrete problems of constitutional dimension, it will be time enough to consider such problems when they arise." *Joseph E. Seagram & Sons v. Hostetter, supra,* 384 U.S. at 52 (1966).

VI.

The final question we address is whether the Commission's decision to deny Nova a license was error under D.C. law. The Commission's denial was based on its conclusion that Nova did not meet the District's requirements for adequate full time faculty and adequate library resources as set out in relevant part below:

> That considering the number and character of courses offered, the faculty is of reasonable number and properly qualified, and that the in-

> stitution is possessed of suitable . . . library equipment.

D.C. Code § 29-815(4).

> There shall be a sufficient number of full-time teaching appointments to ensure continuity and stability of the educational program, as well as to provide adequate educational association between students and faculty.

Regulations § III(4)(b)

> The collection of books, periodicals, newspapers, . . ., shall be adequate for the needs of the educational programs of the institution, and shall be readily accessible to the faculty and the students.
>
> Provisions shall be made for the continuous acquisition of current library materials and for the recording of all library holdings.

Regulations § III(8)(a)(b)

The facts upon which the Commission rested its conclusion that Nova did not meet the District's library and faculty standards are essentially undisputed.[18] As to library facilities, the Commission found that Nova had no library in the District of Columbia and no plans to

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[18] The record suggests that the Commission also concluded that Nova did not meet District standards related to clear delineation of administrative control. We do not address this question in that the Commission's decision is supported by its conclusions regarding library and faculty requirements. We need not consider whether resting our holding on only two of the three prongs relied upon by the Commission should cause us to consider remanding to the Commission because at oral argument Nova specifically rejected any possible remand remedy.

establish one. Rather, Nova arranged with George Mason and Howard Universities to have their libraries available for Nova's students, and intended to rely on existing public and governmental institutions in the District.

As to faculty resources, the Commission found that Nova's faculty for the DPA program consisted of nine full-time Florida members and 33 part-time national faculty members (preceptors) for a projected 15 clusters, or approximately 380 students. The Florida faculty provides 50% of the DPA instruction as well as teaching in other departments and performing administrative duties. The turnover rate among the Florida faculty was 50% between August 1981 and August 1982. As we have previously stated, the preceptors, who contract with Nova to teach specific courses at the various clusters, are scholars prominent in the public administration field. Each cluster, consisting of 20-25 students, is coordinated by a cluster director, who is a part-time contractor, paid monthly by Nova under a three-year contract, and generally employed in a full-time position elsewhere. Cluster directors administer comprehensive examinations, arrange and assist in cluster sessions, counsel students, and assist the faculty in research and reading of student papers. Other than the contract students have with preceptors and cluster directors during weekend teaching sessions, contact is by special appointment, telephone and written communication.

Based upon these findings, the Commission concluded that Nova did not meet the District's requirements for adequate full-time faculty and library resources. The Commission interpreted the statute and regulations as requiring Nova to satisfy the District's faculty requirements independently of Nova's staff at its principal institution in Florida and as requiring Nova to provide

its *own* library. On the basis of these deficiencies, the license was denied. This denial was without prejudice to Nova renewing its application and the Commission offered to advise Nova as to how Nova could meet these requirements.

Nova does not dispute the factual findings upon which the Commission based its conclusion, but argues that the Commission's conclusion was wrong—that in fact Nova did meet the District's requirements and that the Commission's conclusion that Nova must meet faculty requirements *in the District* independently of its faculty resources elsewhere and must establish its *own* library was an unreasonable and erroneous interpretation of the statute and regulations.

This court does not undertake a de novo review of the record in an administrative proceeding. *E.g., Pendleton v. District of Columbia Board of Elections and Ethics*, 449 A.2d 301, 307 (D.C. 1982). Rather, we examine the record to determine whether the conclusion is reasonable, and based on "reliable, probative, and substantial evidence" of record. *Id.* at 304 (citing D.C. Code § 1-1509 (e) (1981)). "Substantial evidence is more than a mere scintilla [of evidence]; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Jameson's Liquors, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 384 A.2d 412, 418 (D.C. 1978) (citations omitted) (quoting *The Vestry of Grace Parish v. District of Columbia Alcoholic Beverage Control Board*, 366 A.2d 1110 (D.C. 1976)). Moreover, when an agency's decision is based on an "interpretation of the statute and regulations it administers, [that interpretation] will be sustained unless shown to be unreasonable or in contravention of the language or legislative history of the statute." *DeLevay v. District*

of Columbia Rental Accommodations Commission, 411 A.2d 354, 359 (D.C. 1980) (citations omitted). We hold in this case that the Commission's denial was based on substantial evidence and was reasonable and consistent with the language and purpose of the statute.

The record reflects that the Commission's concern was that *none* of Nova's faculty, full-time or otherwise, was consistently present in the District of Columbia. Considerable evidence was presented during the hearing regarding the importance in doctoral programs of face-to-face interaction between faculty and students, particularly for supervision and counseling during research projects. Not only was student-faculty interaction significantly reduced by the lack of any Nova faculty in the District, but evidence suggested that Nova's nine DPA faculty members in Florida could not provide adequate supervision and continuity in that they were non-tenured, subject to high turnover rates, and had significant responsibilities outside the DPA program. And despite the recognized excellence of Nova's preceptorial faculty, these teachers had only limited contact with students. Under these circumstances, the Commission's conclusion that Nova must satisfy faculty requirements in the District independently of its faculty in Florida was not unreasonable, and its conclusion that Nova's plans did not provide for sufficient full-time faculty to assure adequate interaction between faculty and student and continuity and stability in the overall program was supported by substantial evidence.

Nor do we believe that the Commission's conclusion that Nova did not meet the District's requirements for adequate library resources was unsupported by substantial evidence or erroneous as a matter of law. D.C. Code § 29-815(4) requires degree-conferring institutions to

"possessed of suitable . . . library equipment." The Regulations require, *inter alia*, an adequate "collection of books" and "continuous acquisition of current library materials." Regulations § III(8)(a)(b). The Commission reasonably interpreted this language as requiring educational institutions to establish their own libraries, rather than rely on the public or private libraries otherwise available in the District or suburbs of the District. This interpretation is consistent not only with the language but with the purpose of the statute in that it ensures that an educational institution has materials appropriate to the degree program as well as library hours that meet student needs and assures some degree of stability and continuity due to the substantial investment it requires from an institution. Of course, the Commission has the discretion to waive this as well as other requirements when it believes the requirement is inapplicable or unnecessary in particular cases. However, we cannot say that the Commission's failure to do so in this case was irrational or not based on substantial evidence. Not only were Nova's arrangements with Howard and George Mason Universities contrary to the express mandate of the statute and regulations, Nova's arrangements did not ensure that the purposes of this requirement would be met. As the Commission points out, George Mason and Howard University do not have doctoral programs in public administration and Nova would have no control over their acquisitions; the arrangements have no guaranty of permanence because any of the schools could revoke the agreements; and Nova is not committed to an investment that would encourage stability and permanence of their program in the District.

Finally, we cannot say that the Commission erred in its conclusion that the library and faculty deficiencies in

Nova's program justified denying Nova a license. In this regard, we note that in denying Nova a license the Commission is not holding that Nova's program is in fact substandard, but rather that certain deficiencies present an unacceptable risk that the program will be "substandard" or "transient" or will result in the conferral of "false or misleading" degrees. D.C. Code § 31-1601 (1), (2) (1981). Given the complete lack of faculty and library resources in the District, who hold that the Commission's decision was justified by the evidence and in accord with the law.

Affirmed.

APPENDIX B

GOVERNMENT OF THE DISTRICT OF COLUMBIA EDUCATIONAL INSTITUTION LICENSURE COMMISSION

In the Matter of:

Sufficiency of Nova University's	:
Application to Offer Courses for	:
the Doctorate of Public Administration	:

FINDINGS OF FACTS, CONCLUSIONS OF LAW

The Commission having considered this matter makes the following:

FINDINGS OF FACT

1. On October 20, 1980, Nova University (hereafter, "Nova"), filed with the District of Columbia Educational Institution Licensure Commission (hereafter, "Commission") an Application for a license to offer Doctorate of Public Administration (DPA) Degree Courses in the District of Columbia. (D.C. Ex. H-53).

2. After review by the Commission of the Nova application, the site evaluation team report, and the responses of Nova, the Commission issued on March 18, 1982 Resolution No. 82-09 indicating its intent to deny the Nova application and informing Nova of its right to appear before the Commission. (D.C. Ex. H-25).

3. A hearing to address the Commission's intent to deny Resolution was convened on August 19, August 23 and August 24, 1982. Summations were presented and heard on October 21, 1982 (Tr. I, II and III, and Sum. Tr.).

4. Nova University was founded in 1964 and is located on a 200-acre site in Fort Lauderdale, Florida (D.C. Ex. H-53, pp. 1, 2).

5. In consideration of an in-kind payment of $1,200,000 from the New York Institute of Technology (N.Y.I.T.) Nova formed a federation with N.Y.I.T. in 1970. (Tr. I, 49, Fischler).

6. The federation agreement between Nova and N.Y.I.T. provided that the president of N.Y.I.T. shall be the chancellor of Nova, an agreement which continues until the present time. (Tr. I, 49, 83, Fischler).

7. The chancellor of Nova, that is, the president of N.Y.I.T. serves as the chief executive officer of Nova. (Tr. I, 80 Fischler; D.C. Ex. H-37, App. 1).

8. The Nova organization chart does not portray the role N.Y.I.T. plays, through its president who is chancellor and chief executive officer of Nova, in the mangement of Nova's affairs. (D.C. Ex. H-37, App. 1.).

9. Nova awards of Doctorate in Public Administration through its Center for the Study of Administration in Fort Lauderdale, Fla. (D.C. Ex. H-53, p.4.).

10. Nova's delivery system for the DPA program is comprised of a resident (Fort Lauderdale) faculty who provides 50% of the DPA program instruction and perform other faculty functions relating to curriculum, etc. National faculty members (preceptors) consist of distinguished scholars prominent in the public administration field. The preceptors are assigned to teach specified subject sequences through cluster networks in the students' resident locations. Each cluster, consisting of 20-25 students, is coordinated by a cluster director, whose role includes primarily administrative and recruitment duties. (D.C. Ex. H-53, pp. 4, 5.).

11. Student contact with cluster directors and preceptors usually occurs just before, during, and after course conferences. Telephone contacts often occur at other times, (Tr. II, 63, Graham) and face-to-face contacts can be scheduled by special arrangement. (Tr. II, 193, Hazel).

12. Administrative control of the DPA program rests with the DPA program director, who is also a contract faculty member, (Tr. II, 136-7, Clarke) and who in turn reports to the director of the Center for the Study of Administration. (Tr. II, 122, Clarke).

13. Control of the DPA program lies in Fort Lauderdale, at the level of the program director. (Tr. I, 97, Fischler).

14. Cluster directors are part-time contractors, generally employed on a full-time basis elsewhere, who receive a monthly stipend under a three-year contract. (Tr. II, 144-45, Clarke).

15. Cluster directors report directly to the DPA program director and are responsible for the administration of comprehensive examinations, attendance at cluster courses, (Tr. II, 121, Clarke) counselling of students, formation of study groups, assisting national faculty with research, reading of student course commentaries, arrangement of and participation in Friday night cluster sessions, (Tr. II, 120, Clarke) and the recruitment of students. (Tr. II, 122, Clarke).

16. There are presently nine full-time (resident) and 33 national (preceptors) DPA faculty members (Tr. II, 115, Clarke).

17. There are presently 11 active DPA clusters, and that number is expected to increase to 15 in the near future, (Tr. II, 103, Clarke) servicing approximately 380 DPA students. (D.C. Ex. H-36, p.14).

18. The Nova organization chart does not portray the director of the DPA program, the cluster directors, the national faculty, (preceptors) or their respective roles and multiple duties. (D.C. Ex. H-37, App. 1).

19. The organization chart depicting the proposed District of Columbia DPA model does not show lines of administrative or operational authority for the DPA program independently of the N.Y.I.T. (D.C. Ex. H-36, p.6).

20. A number of individuals considered by Nova to be full-time DPA faculty may in fact be performing other, non-DPA functions, teaching in other departments, or may not be associated with the DPA program at all from year to year. (Tr. II, 39, 40 Graham).

21. Turnover of Nova full-time faculty is subject to cause confusion among students. (Tr. II, 151, Clarke). At least five of the ten DPA faculty members identified by the evaluation team in August, 1981 had been replaced by new persons as of August 1982. (Nova Ex. 12; D.C. Ex. H-37, App. 3.).

22. Nova has indicated its intent to commit full-time faculty presence to a Nova Regional Learning Center located in the District of Columbia. (D.C. Ex. H-29, p.2; Tr. II, 122, 124, Clarke).

23. The DPA curriculum consists of nine subject sequences covering selected public administration topics. Each sequence consists of a minimum of three two-day course conferences at the cluster location. Course commentaries are prepared by students for each course conference. Sequences seven, eight and nine consist of week-long workshops at the Fort Lauderdale campus. Students must prepare major written assignments consisting of an analytical report and project, and an administrative history, all relating to the agency where the student is em-

ployed. After two years, a comprehensive written examination is given. Finally, an oral examination is administered by 3 full-time faculty members at Fort Lauderdale. (D.C. Ex. H-53, pp. 14, 15, 16).

24. A sampling of DPA candidate analytical reports by the evaluation team members raised serious doubts as to whether the Nova Program meets the quality level of reputable institutions awarding the same degree. (D.C. Ex. H-37, p.7).

25. One student testified that he could not recall the name of the faculty member who reviewed his analytical research proposal for adequacy. (Tr. II, 202, Hazel).

26. To be admitted into the Nova DPA program, the candidate must:

(1) Be employed full-time in a responsible administrative position;

(2) Have at least five years experience in public service;

(3) Have a master's degree in related area from an accredited institution;

(4) Have a GMAT or GRE test score, and

(5) Present evidence of college level statistics and research skills. (D.C. Ex. H-53, p.53).

27. The evaluation team found evidence of past exceptions to the master's degree requirement. The team also expressed concern about the absence of entry level writing proficiency requirements.(D.C. Ex. H-37, p.13).

28. Nova was given a five-year accreditation in 1971 by the Southern Association of Colleges and Schools. The University received a 10-year reaffirmation of its accreditation in 1975. (Tr. I, 61 Fishcler). In 1980 the Association examined the field based programs of the Univer-

sity separately, including the DPA program. The review of these programs had no effect on the accreditation of the University. (Tr. I, 114, 115, 116, Fischler; Nova Exs. 6 and 6 (a)).

29. Nova does not now have, and has discouraged the future establishment of, a library in the District of Columbia, but rather has negotiated arrangements for the use by Nova DPA students of the library facilities of Howard and George Mason Universities, and relies on existing public, governmental and other institutions in the District of Columbia. (Tr. II, 162, Clarke).

30. The University has an unencumbered endowment of $6 million, constituting partial proceeds from a $16 million bequest in 1979 from the estate of a benefactor. Nearly $10 million of the principal is being held in trust pending disposition of an inquiry by the Internal Revenue Service as to whether the gift is subject to federal estate taxes. (D.C. Ex. H-52, p.61; D.C. Ex. 37, p.9).

DECISION AND ORDER

WHEREFORE, it is by the Commission this 19th day of January 1983,

ORDERED:

1. That the application of Nova University for authority to offer Doctorate in Public Administration courses in the District of Columbia be denied due to deficiencies in meeting the requirements set out under D.C. Code 1981, §29-801 to 29-820 and in the Commission Regulations, Section III, Criteria for Licensure, subsection 4, relating to full-time faculty with a teaching load which incorporates an adequate student-teacher ratio, and Section III, subparagraph 8, which sets out the need for a library, i.e., a collection of books, periodicals, newspapers, teacher aids and other materials, and provisions for an aquisition policy, professional staff to operate the library and defined seating and work space.

2. That the denial of the application is without prejudice, and if the applicant wishes to supplement the application by correcting the aforementioend deficiencies, the Commission will reconsider the application. If the applicant wishes to supplement the record accordingly, the Commission should be so advised within a reasonable time, whereupon the Commission will advise the applicant as to what the Commission deems to be an adequate library, and what it deems to be an adequate full-time faculty and student-teacher ratio.

3. That the applicant be and hereby is notified of its right to appeal the decision of the Commission as provided in the District of Columbia Administrative Procedure Act, D.C. Code 1981, §51-1501 to 1-1510.

By the Commission.

/s/ Rohulamin Quander
Rohulamin Quander, Chairman

Issued: February 10, 1983

CERTIFICATE OF SERVICE

I, Steve Gibson, a Program Analyst with the Educational Institution Licensure Commission, certify that on this date I have caused a copy of the Commission's Findings of Facts, Conclusions of Law, Decision and Order to be delivered to the following in the manner indicated:

BY FIRST CLASS MAIL
POSTAGE PREPAID:

Mr. Hershel Shanks
Attorney at Law
1317 F Street, N.W.
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Dr. Abraham S. Fischler
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Assistant Corporation Counsel
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Washington, D.C. 20004

/s/ Steve Gibson
Steve Gibson, Program Analyst

APPENDIX C

PERTINENT CONSTITUTIONAL PROVISIONS

A. The First Amendment to the United States Constitution provides in pertinent part as follows:

> Congress shall make no law . . . abridging the freedom of speech. . . .

PERTINENT STATUTORY PROVISIONS

D.C. Code, Title 29, Chapter 8 (Institutions of Learning) provides in pertinent part as follows:

§ 29-815. License to confer degrees — Issuance by Educational Institution Licensure Commission required.

No institution heretofore or hereafter incorporated under the provisions of this chapter shall have the power to confer any degree in the District of Columbia or elsewhere, nor shall any institution incorporated outside of the District of Columbia or any person or persons individually or as a partnership or association or otherwise, undertaking to confer any degree, operate in the District of Columbia, unless under and by virtue of a license from the Educational Institution Licensure Commission, which before granting any such license may require satisfactory evidence:

(1) That in the case of an indvidual or any unincorporated group of individuals he, or a majority of them, or in the case of an incorporated institution, a majority of the trustees, directors or managers of said institution are persons of good repute and qualified to conduct an institution of learning;

(2) That any such degree shall be awarded only after such quantity and quality of work shall have been completed as are usually required by reputable institutions awarding the same degree: Provided, that if more than one-half the requirements for any degree are earned by correspondence, or extramural study, such fact shall be conspicuously noted upon the diploma conferred: Provided further, that no diploma shall be issued conferring a degree in medicine or any healing art, or in dentistry, for study pursued or work done by correspondence;

(3) That applicants for said degree possess the usual high school qualifications at the time of their candidacy therefor;

(4) That considering the number and character of the courses offered, the faculty is of reasonable number and properly qualified, and that the institution is possessed of suitable classroom, laboratory, and library equipment.

§ 29-819. Penalties for conferral of degrees without licenses.

Application for the license referred to in § 29-815 shall be in writing upon forms prepared under the direction of the Educational Institution Licensure Commission, and shall be filed with the Secretary of the said Commission

. . . .

§ 29-819. Penalties for conferral of degrees without licenses.

Any person or persons who shall, directly or indireclty, participate in, aid, or assist in the conferring of any degree by any unlicensed individual or individuals, association, or institution whose license has been revoked, or shall advertise or claim any authority to confer any such degree,

except in pursuance of provisions of §§ 29-814 to 29-819, or who shall violate the provisions of § 29-818 shall be deemed guilty of a misdemeanor, and upon conviction thereof in the Superior Court of the District of Columbia shall be punished by fine of not more than $2,000, or imprisonment for not more than 2 years, or both.

D.C. Code, Title 31, Chapter 16 (Educational Institution Licensure Commission) provides in pertinent part as follows:

§ 31-1601. Purpose.

The purpose of this chapter is to provide for the protection, education, and welfare of the citizens of the District of Columbia, its private educational institutions, and its students, by:

(1) Establishing minimum standards concerning quality of education, ethical and business practices, health and safety, and fiscal responsibility, to protect against substandard, transient, unethical, deceptive, or fraudulent institutions and practices;

(2) Prohibiting the granting of false or misleading educational credentials;

(3) Regulating the use of academic terminology in naming or otherwise designating educational institutions;

(4) Prohibiting misleading literature, advertising, solicitation, or representation by educational institutions or their agents;

(5) Providing for the preservation of essential academic records;

(6) Advising the Mayor and Council of the District of

Columbia periodically as to the educational and vocational training needs of the District of Columbia; and

(7) Serving as the state approving agency for veterans benefits.

§ 31-1602. Definitions.

For the purpose of this chapter:

. . . .

(4) "Educational institution" means a private-school, high school, middle school, elementary school, academy, institute, junior college, college, university, or proprietary school in the District, or any branch, extension or facility operating in the District, of an institution chartered elsewhere, or, any branch, extension or facility operating elsewhere of a facility chartered in the District, which furnishes or offers to furnish instruction or educational services leading toward a high school diploma degree; or purporting to lead to college level credit, or prerequisite to an academic, business or professional degree beyond the secondary school level; or which offers for consideration, resident or correspondence courses or training or instruction for the purpose of enabling an individual to improve his intellectual aptitude, or which purports to prepare or qualify individuals for employment in any occupation or trade or work requiring mechanical, technical, artistic, or clerical skills . . . .

(5) "Degree" means any designation, mark, appellation, series of letters or words, academic or honorary title, diploma, certificate, or other symbols which signifies, purports or is generally taken to signify satisfactory completion of the requirements of an academic, educational, vocational, or professional program of study beyond the secondary level.

(6) "To grant or to confer" includes awarding, selling, conferring, bestowing, or giving.

(7) "Education" or "educational services" or like term includes, but is not limited to, any class, course, or program of training, supervision, instruction or study.

. . . .

(11) "To operate" or "operating" when applied to an educational institution means to establish, keep, or maintain any facility or location in the District, or to keep, or maintain any facility or location chartered in the District where from or through which, education is offered or given, or educational credentials are offered or granted, and includes contracting with any person, group, or entity to perform any such act.

§ 31-1603. Educational Institution Licensure Commission — Established.

There is hereby established for the District of Columbia an Educational Institution Licensure Commission (hereinafter in this chapter referred to as the "Commission") which shall license private educational institutions, and their agents, ensure authenticity and legitimacy of private educational institutions, serve as the state approving agency for veterans benefits, for persons choosing private educational institutions and programs, and provide and promulgate standards, criteria, rules and regulations therefor, including rules of procedure for the Commission which will ensure adequate public notice of each meeting of the Commission.

PERTINENT DISTRICT OF COLUMBIA MUNICIPAL REGULATIONS

The Educational Institution Licensure Commission Regulations (1978) provide in pertinent part as follows:

Section I – Philosophy of Higher Education

The measure of quality of an institution of higher education is to be found in its performance in establishing and maintaining an atmosphere in which learning may advance. The quality of its academic program, or its personnel, and of its physical facilities shuld be such as to stimulate and inspire excellence in the endeavors of the students, of the faculty, and of others associated with the institution.

In order to promote high quality, sound educational objectives and high standards should be inherent in any educational institution. The attainment and maintenance of high quality in education is one of the major concerns of the Commission in issuing and renewing licenses to confer degrees.

The policies and procedures contained in this statement have been adopted to assist the institutions of higher education which are required to be licensed by the Commission, to assure prospective students of the quality of those institutions, to assure continuous maintenance of standards.

Section II – Description of the Institution

Each institution requesting a license to confer degrees shall provide the Commission a description of the institution containing the following information which may be supplied, to the extent available thereby, in regularly prepared publications of the institution.

1. Its official name, which must be appropriate to the type of institution and to the programs of study to be offered by it.

2. A statement of the institution's educational philosophy.

3. A statement of institutional purposes and objectives.

4. A statement of the institution's programs, including a description of ways of reaching the objectives and of fulfilling the purposes within its educational philosophy.

5. A statement describing the institution's organization and finances, including an audited verified financial statement, which lists income and expenditures, both prepared by a certified public accountant.

6. A statement describing the institution's board of control and administration.

7. A statement describing the institution's plant and physical facilities.

8. A statement describing the faculty, including:

(a) A description of the institution's policies governing original appointments, continuing appointments, tenure and dismissal.

(b) A list of the faculty indicating the professional preparation and teaching experiences of each member.

(c) A brief description of the program of teaching and other responsibilities to the institution for each member of the faculty.

Section III – Criteria for Licensure

Each institution seeking a license to confer degrees shall supply a statement as to how it is meeting or plans to meet the criteria outlined in this section or a statement giving reasons why it considers itself justified in not doing so in any particular. The Commission recognizes that the following criteria will not be equally applicable to each institution wishing to award degees.

1. Control

   The institution shall clearly delineate responsibilities for the various phases of its operations, stating those policies to be determined by its Board of Trustees or other governing body, those to be determiend by the President or other chief executive officer and by members of the administrative staff, and those to be determined by members of the faculty, by students and by other groups, as well as those policies to be determined jointly.

2. Administration

   A competent and adequate administrative staff shall be provided, and administrative policies and procedures shall be clearly defined and stated.

3. Finances

   The institution shall provide a written statement of fiscal policy and shall have financial resources sufficient to fulfill its stated objectives. If the institution is operated on the basis of incorporation for making of profit, it shall provide information sufficient to establish that profits are not derived to an extent or in such a manner as to be inconsistent with the maintenance of reasonable

standards and high quality of educational programs.

4. Faculty

(a) The members of the faculty shall possess academic, scholarly and teaching qualifications appropriate to their respective positions.

(b) There shall be a sufficient number of full-time teaching appointments to insure continuity and stability of the educational program, as well as to provide adequate educational association between students and faculty.

(c) The classroom teaching loads of the members of the faculty shall be such as to permit adequate study for classroom preparation, professional growth, and other appropriate non-teaching functions.

5. Curricula

(a) The curricula and programs of study shall be related to the objectives of the institution and shall provide sequences of appropriate subjects leading to competence in the respective fields of study.

(b) Provision shall be made for continuing reassessment of the educational programs of the institution.

6. Correspondence, Extension and Summer Session Programs

All courses offered by correspondence, extension, or in summer sessions shall be consistent with the objectives and purposes of the institution, and shall be consistent with and comparable in quality to courses offered to students regularly enrolled on a full-time basis.

7. Admission Requirements

Admission to the institution shall be based upon standards which will assure the prospective student and the institution that the applicant should be able to pursue and complete successfully the program of education for which he has been granted admission. For admission of first year undergradute students the satisfactory completion of a four-year course in an approved secondary school would normally be required. However, such a policy should not preclude the use of other criteria of equivalent value in the admission process.

8. Library

(a) The collection of books, periodicals, newspapers, teaching aids, other instructional materials, shall be adequate for the needs of the educational programs of the institution, and shall be readily accessible to the faculty and the students.

(b)Provisions shall be made for the continuous acquisition of current library materials and for the recording of all library holdings.

(c) The library shall be operated by a professionally trained staff adequate to serve the purposes and objectives of the institution.

(d) Seating and work space for quiet study be provided for a reasonable proportion of the faculty and students to be accommodated at one time.

9. Physical Plant and Equipment

(a) The institution shall provide and maintain a physical plant with living and study conditions appropriate for the programs of study offered

and for the size of faculty and student body. Regulations with respect to fire hazards, hygiene, floor space, ventilation, heat, light, and so forth of the District of Columbia (or of the appropriate legal jurisdiction, if situated elsewhere) must be met.

(b) Laboratories shall be adequate in space and equipment for the courses taught and the students enrolled, and shall incorporate appropriate safety measures.

10. Student Personnel, Health, and Recreational Services.

(a) An adequate program of educational, occupational, and personal counseling shall be operated, and the necessary records maintained to support such a program.

(b) Access of students, faculty, and other employees to adequate health care shall be provided.

(c) Recreational and social programs appropriate to the objectives of the institution shall be offered.

11. Publications

The catalogue, which the institution shall publish, no less frequently than every two years, shall contain as a minimum the following information:

(a) the institution's objectives and purposes,

(b) names of the members of its governing board of the faculty, and of the administrative staff,

(c) curricular offerings and programs of study,

(d) admission and degree requirements,

(e) student costs and policies of refunds, and

(f) other regulations and requirements.

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APPENDIX D

THE UNIVERSITY OF NORTH CAROLINA
General Administration
P.O. Box 2688
CHAPEL HILL 27514

WILLIAM FRIDAY
President

TELEPHONE: (919) 933-6981

December 5, 1978

MEMORANDUM

To: Committee on Educational Planning, Policies, and Programs
From: William Friday
Re: Nova University

You have seen the report of the consultant group we asked to review the merits of Nova University's request for licensure in North Carolina. You have received my recommendations that Nova University be denied licensure based on the recommendation of the consultant group. You have heard the information presented by Nova University staff, witnesses, and attorneys in response to my recommendation. As you study the issue further, I want to provide you with a strong reiteration of my recommendation that Nova University be denied licensure in North Carolina at this time. In so doing, I want to return to the central issue and to some basic points that may have been obscured by the lengthy review of this case or by some of the information submitted by Nova University in support of its request for a license.

The Issue Before Us

The issue is whether or not Nova University should be licensed to provide instructional activities in North

Carolina which lead to graduate degees to be issued by Nova University, an institution of higher education chartered in Florida and currently accredited by the Southern Association of Colleges and Schools. The review of Nova's request should focus upon whether or not the resources and proposed programs of study are of satisfatory quality and depth to constitute acceptable academic degree programs for the citizens of North Carolina. The issue is not whether the Board has the authority to license out-of-state institutions of higher education – the General Assemlby has so provided – or whether Nova Unviersity faculty members are of sufficient quality to offer post-baccalaureate instruction. Additionally, while it has been and continues to be the concern of the Board that the quality of instruction in our own constituent institutions be of the highest order, Nova's claim to licensure based on a comparison of their activities with programs currently authorized in The University is irrelevant.

Basic Points

First, the attitude of Nova University's representatives toward the representatives of The University of North Carolina and the entire licensing process has been such as to induce great caution on the part of all persons dealing with this matter. From the begining, the effort of Nova has been primarily to argue that the law is invalid, or that it has been wrongly applied to Nova's activities, rather than to attempt to modify its program to comply with the Board's standards, Moreover, there has been throughout a threat of litigation if other means did not result in a license for Nova's North Carolina operations. This factor has led us to seek the advice of visiting team members from outside The University and outside the State in order to dampen any bias arising from cautionary advice from my staff and from members of our own academic community,

as well as the advice of our Attorney General (ignored by Nova University) that Nova activities not be expanded in North Carolina until the licensure issue was resolved. This atmosphere of caution should at least lead us to be especially careful in our review of Nova University's application for permission to offer programs in North Carolina leading to graduate degrees.

Second, with regard to any proposed doctoral program in education, the Board has gone on record, in the Long-Range Plan and in adopting the report of the Teacher Education Review Program, that there is no need for new doctoral progrms in education in North Carolina for the foreseeable future. It has, instead, stated that there is a need to provide improved access to post-master's degree training in education through an extension of existing programs, possibly through interinstitutional program arrangements among our constituent institutions.

Third, from the information provided by Nova University with regard to its doctoral program in education, it seems clear that the proposed program, and indeed the program currently being operated in certain "clusters" in North Carolina, would not be recommended either for planning or for initiation under the current requirements of our academic program development procedures if it were put forward by a constituent institution of The University. The requirements for the doctoral degree in education currently being used by each of the three constituent institutions of The University authorized to offer such degrees are as follows:

*1. *A bachelor's degree from a recognized and accredited institution of higher education. Some programs emphasize a master's degree among candidates for admission.*

2. *In some programs a prior period, often three years, of successful teaching or administrative experience.*

*3. *Satisfactory scores on the Graduate Record Examination, Miller Analogies Test, and/or other tests.*

*4. *A minimum residence of one year (two continuous semesters) at the University. Most students spend more than one year, frequently two or three, in residence.*

5. *A minor area of study (and often two minors) is completed. This may be within Education or in an Arts and Sciences program.*

*6. *Language requirements and/or research tools such as computer applications.*

*7. *A written comprehensive examination, usually toward the end of two years of coursework, often three.*

*8. *A comprehensive oral examination on the content of the doctoral studies completed and professional issues and information.*

*9. *Continuous study and completion of an acceptable doctoral dissertation under superivison of a committee of five full time faculty members who are members of the gradute faculty of the institution. One member of the Committee (the Chairman) provides supervision and guidance to the candidate throughout doctoral studies.*

*10. *Successful defense of the dissertation upon written and oral presentation to the doctoral committee.*

11. *Some programs require a semester or year of supervised teaching, research, or administrative work (de-*

**requirements in all programs*

pending on the area of study) as part of the requirements for the degree.

Fourth, it is the basic responsibility of the Board not only to license institutions of higher education providing instruction in the State but also to continue to review its existing programs in relation to an overall academic plan and to consider that plan in its licensing decisions. If there is a need for the programs proposed by Nova University, it should be met by one or more of the constituent institutions of The University rather than by external agencies either inside or outside the State, and the programs should be offered consistent with sound educational practices as determined by the Board with the advice of the academic community available to it. Nova's programs are competitive with plans to strengthen the formerly black institutions as well as those formerly white institutions in the eastern and western regions of the State which are gradually building the potential for offering advanced graduate programs, in the event there is a need for such programs in the future. Such external programs are disturbing to the developing balance of constituent institutional programs which the Board is attempting to achieve in order to better serve the needs of the State, in an organized and planned manner, as well as to the Board's efforts to assure efficient use of our resources.

The proposed Nova programs are unnecessarily costly and duplicative and are potentially disruptive to our own long range plans. They would have an unfortunate effect on the developing partnership between the Board of Governors and the State Board of Education in their efforts to develop an improved educational support system. It would be inconsistent with the measures for quality improvement in teacher education that we are now jointly considering if we were to approve the Nova programs as acceptable doctoral-level programs.

For these reasons as well as the others you have heard, I repeat here my recommendation that you do not approve the request for licensure submitted by Nova University.

WF/cw

February 16, 1983

BY HAND

Educational Institution Licensure
Commission
605 G Street, N.W.
Suite M-102
Washington, D.C. 20001

Re: *Nova University*

Dear Mr. Quander and Members of the Commission:

Yesterday I sent over to the Commission for a copy of the Commission's "Findings of Fact, Conclusions of Law and Decision and Order" in the captioned case. The "Decision and Order" is dated January 19, 1983. The document indicates that it was "issued" on February 10, 1983. The certificate of services does not appear to be dated, and I have not yet received the service copy.

This letter is in reference to paragraph 2 of the Decision and Order. It states that the applicant may supplement the application to correct the two deficiencies specified in paragraph 1 of the Decision and Order. Paragraph 2 goes on to state:

> If the applicant wishes to supplement the record accordingly, the Commission should be so advised within a reasonable time, whereupon the Commission will advise the applicant as to what the Commission deems to be an adequate library, and what it deems to be an adequate full-time faculty and student-teacher ratio.

This is to advise you that the applicant does wish to supplement the record and accordingly requests the Commission to advise it as promptly as possible as to what the Commission deems to be an adequate library and what the

Commission deems to be an adequate full-time faculty and student-teacher ratio.

As you know, the time within which the applicant may appeal from the Commission's decision is only 15 days from the date we are given formal notice of the decision. D.C.C.A. Rule 15(b). Accordingly, we must know very quickly what the Commission deems to be adequate in the two aforementioned respects so as to determine within the appropriate time limits whether to appeal from the Commission's decision. For that reason, we are very promptly notifiying the Commission of our desire to take advantage of paragraph 2 of the Decision and Order, and trust that the Commission will be able to provide us with the requested information within 5 days at most.

Very Truly yours,

Hershel Shanks

HS:lb
cc: Rohulamin Quander, Esq.
1010 Vermont Avenue
Suite 420
Washington, D.C. 20005

The democratic roots of the external degree movement are reflected in the following comments:

> The impact of the external degree movement on American higher education has been and still is viewed by many authorities as a radical departure from traditional patterns of American higher education. Close examination of the historical evolution of American higher education, however, reveals that the external degree movement represents a logical and predictable development in the ongoing quest to integrate democratic ideals into education practices. Viewed from this perspective, the external degree becomes one of many tributaries in the stream of innovations characterizing the history and philosophy of American higher education.

* * * * *

> The egalitarian philosophy of the external degree movement is a natural consequence of the striving of higher education to realize democratic ideals. . . This evolution of ideas about education has been marked by strong ideological challenges to past beliefs. Inevitably these challenges have broken some barriers and erected others. Throughout its history, however, participation has broadened in ever widening circles as higher education has drawn nearer to its democratic ideals.
>
> Contemporary American higher education is diverse in institutional form and educational process. The old exists alongside the new. In this regard, the external degree represents a "new kid on the block," not yet integrated into the dominant pattern of higher education, but full of promise for tomorrow.

Boone & Fox, "A Historical and Philosophical Perspective on the External Degree, 56 Peabody J. of Education at 159, 159-66 (1979).

See also Report of the Commission on Non-Traditional Study (Samuel B. Gould, Chm'n). Few innovations in higher education have met with more ready acceptance by a diversity of people and institutions than non-traditional study and its various forms – external degree, Extended University, Open University, University Without Walls, and others. Although the movement that gave birth to these models and plans is difficult to define with any precision, people share a common understanding about the nature of this new concept of education. Its greatest departure from traditional education is its explicit recognition that education should be measured by what the student knows rather than how or where he learns it. Beyond that it builds upon two basic premises – that opportunity should be equal for all who wish to learn and that learning is a lifelong process unconfined to one's youth or to campus classrooms.

Other authorities include: G. Birkhead & J. Carroll, *Education for Public Service* (1979); L. Mayhew, *Legacy of the Seventies* (1977); C. Houle, *The External Degree* (1973).